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NO. 1369

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

VAN GESNER,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

MARION R. BIGGS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

JOHN NEWTON WILLIAMSON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

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Filed this..... day of February, A. D. 1907.
FRANK D. MONCKTON, Clerk,

By ..... Deputy Clerk.

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REPLY BRIEF OF PLAINTIFFS IN ERROR.

The Defendant in Error has served upon us a brief in this cause and also what is called a supplemental brief.

In this reply brief we shall discuss the questions presented in both.

It is claimed by defendant in error that the writ in this case as to Williamson should be dismissed on the ground that a previous writ had been taken to the Supreme Court of the United States, but this contention is based upon a misconception of the law—an assumption that where a party takes a writ of error to the United States Supreme Court on constitutional grounds that those constitutional grounds *alone* are presented to that court. But this is not true, as will be seen by an examination of the Burton case. On the contrary, if the court takes jurisdiction att all it passes *upon all the questions involved, whether constitutional or otherwise.* Indeed, it will not pass upon the constitutional question at all if there are any other grounds upon which the case may be decided.

Burton vs. United States, 196 U. S. 283.

The writ of error to this court was not taken with the idea of having *both* courts pass upon the merits. Of course we concede that we are not entitled to a decision of this court if the previous writ to the Supreme Court in the Williamson Case was properly taken. But, it is equally plain and true that if the Supreme Court has *no jurisdiction*, then that writ of error was *null and void* and this one stands. At the time the writ of error was taken ot the Supreme Court of the United States it was a doubtful question with the attorneys for plaintiff in error, as to whether or not the Supreme Court would apply the doctrine of the Burton Case (in which the constitutional question was then still undecided and open), to a case like this, there being some room for distinction between the two, and we did not feel that we ought to lose our rights altogether to have our contentions upon the merits

passed upon by this court, if the Supreme Court should hold the writ of error to that court, *void upon jurisdictional grounds.*

We supposed that the writ of error would come up first in the United States Supreme Court or at least that the question would remain in statu quo until the jurisdictional questions would be passed upon by that Court and that then, if the Supreme Court held that it had jurisdiction they would proceed to pass upon the merits and the writ of this Court in the Williamson Case could be dismissed, as it would then be void and ineffectual. But if, on the other hand, the Supreme Court should hold that writ of error, void and of no effect, then the writ tothis court would be valid and the merits of the case could be passed upon here

INDICTMENT NOT SUFFICIENT.

In the brief of the defendant in error it is argued that the demurrer to the indictment and the motion made in arrest of judgment are not sufficient to raise all of the questions discussed in the brief of plaintiffs in error.

Plaintiff in error, Williamson, demurred to the indictment, and this demurrer by stipulation was to stand for each and all of the defendants, and is as follows, omitting the caption, transcript of record p. 39-40.

> "Comes now the above-named defendant, John Newton Williamson, in person and by H. S. Wilson and A. S. Bennett, his attorneys, and demurs to the indictment in the above-entitled cause, and says:
>
> "That said indictment, and the matters and facts therein contained in manner and form as the same are stated, are not sufficient in law and are not sufficient to constitute a crime, and that said indictment is not direct and certain as to the crime charged, or the particular circumstances of the crime. And that it does not set forth the name or iden-

tity of the persons defendants are charged with having conspired to suborn, and does not describe or identify the perjury which is alleged to have been suborned, instigated and procured, or the land as to which such perjury was to be committed. And that the said John Newton Williamson is not bound by the law of the land to answer said indictment, and this he is ready to verify.

"Wherefore, for want of a sufficient indictment in this behalf, the said John Newton Williamson prays judgment as to the same, and prays that the same be quashed and adjudged insufficient, and that he may be dismissed and discharged from answering the same."

Defendant's motion in arrest of judgment, see p. 79-80 transcript of record, omitting caption is as follows:

"Comes now the above-named defendant, Van Gesner, for himself by his attorneys, Bennett & Sinnott and Huntington & Wilson, and moves the Court that judgment in the above-entitled cause be arrested as against him for the following reasons:

"First. Error appearing on the face of the record excepted to by said defendant.

"Second. Error committed by the Court and excepted to by the defendant in sustaining objections to the several pleas in abatement filed herein, and in dismissing said pleas and in dismissing said pleas in abatement.

"Third. Error committed by the Court to which the defendant excepted in overruling defendant's demurrer to the indictment herein.

"Fourth. For the reason that the indictment herein does not state a crime in that, among other things, it does not sufficiently, or at all, allege that this defendant, or any of the said defendants, at the time of the alleged conspiracy, or at all, knew that the matter to be sworn to by the persons alleged to be suborned would be false, or that the defendants or either of them then knew that the persons suborned, or any of them, would know their statements to be false at the time they were made or that the defendants knew or believed that the persons to be suborned, or any of them would knowingly or willfully, or corruptly take a false oath in reference to the matters alleged in the indictment or at all.

"Fifth. That said indictment is so uncertain that it does not state a crime, and for each and all of the reasons assigned in said defendant's demurrer on file herein."

Under the common law a general demurrer is sufficient to raise each and every question argued by plaintiffs in error. We cite Bishop's New Criminal Procedure, Volume 1, Sec. 777, wherein it is said: "If a demurrer does not undertake to particularize defects it is termed a general demurrer, if it does a special. While duplicity may perhaps at the common law require a special demurrer, and possibly some other imperfections may also, in most circumstances where no statute intervenes, a defect can be reached as well by general demurrer as by special and the two differ only in form."

While there is a statute which provides the form of a demurrer in civil proceedings in the Federal Courts there is none concerning demurrers in criminal proceedings; hence no statute intervenes and the practice being according to the common law a general demurrer is sufficient.

However, it will be observed from the above demurrer that it is both general and special.

Defective description of the offense is not one of the points in which an indictment is cured by a verdict, but the same is equally fatal in a motion in arrest of judgment as upon demurrer or a motion to quash.

See note No. 2, Sec. 759, Wharton's Criminal Pleading and Practice, 8th Ed.

The only defect which cannot be taken advantage of in a motion in arrest are errors as to form, not going to the description of the offense. The errors set forth in the motion in arrest

of judgment are not unimportant and they are of a character that can be urged for the first time even after verdict. If the indictment is defective in the particulars mentioned in the motion it does not state an offense.

In the case of Harry F. Bacheldor vs. United States, 156 U.S. 426 (Law. Ed. 39, p. 478) the defendant moved in arrest of judgment because the count upon which he was convicted did not "state a public offense against the laws of the United States." The Court held that the words "willfully misapplies" in an indictment under Revised Statute Sec. 5209 are not sufficiently descriptive of the exact offense intended to be punished without further averments showing how the misapplication was made and that it was an unlawful one. The Court said on page 429:

> "By the settled rules of criminal pleading and by the previous decisions of this Court the words 'willfully misapplies,' having no settled technical meaning * * * * do not of themselves fully and clearly set forth every element necessary to constitute the offense intended to be punished; but they must be supplemented by further averments showing how the misapplication was made and that it was an unlawful one. Without such averment there is no sufficient description of the exact offense with which the defendant is charged, etc."

A contention is made in the brief of the defendant in error to the effect that the same certainty and strictness are not required in an indictment attempting to charge a conspiracy as in other cases. The rule is stated in several of the cases cited by plaintiffs in error in their first brief, and we again call the Court's attention to the law as therein announced.

In the case of Pettibone et al, plaintiffs in error, vs. United States, 148 U. S. 197; 37 Law. Ed. 418, Mr. Chief Justice Fuller, speaking for the Court, says on page 203:

> "The general rule in refercnee to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted such omission cannot be supplied by intendment or implication, the charge must be made directly and not inferentially or by way of recital." The Chief Justice further says on the same page:
>
> "And the rule is accepted as laid down by Chief Justice Shaw in Com. vs. Hunt, 4 Met. 111, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

The above rule was announced by the Supreme Court of the United States in construing an indictment charging a conspiracy to commit an offense against the United States under Sec. 5440, and it undoubtedly applies to the case under discussion.

An indictment charging conspiracies to cheat or defraud have sometimes been held sufficient although very general in their terms. The courts have gone further in holding good indictments charging conspiracies to cheat and defraud than in any

other class of cases. It is said in the Encyclopedia of Pleading and Practice, Volume 4, page 724, that:

> "According to the English practice as gathered from the decisions it is not necessary to set out the contemplated means for effecting the cheat, but a general charge is sufficient." It is further said:
>
> "The English practice just stated has been followed in some of the American courts; but such practice has been regarded as very loose and informal, and the better rule seems to be that the indictment should set out the unlawful means intended to be used, since the words "cheating and defrauding" do not *ex vi termini* import anything unlawful, and it becomes necessary for the court to see that the intended means are in fact illegal."

The United States Supreme Court has not adopted the rule that an indictment attempting to charge a conspiracy is to be construed with any less strictness or that it may be less certain than indictments in ordinary criminal cases.

Of course, the indictment does not charge the conspiracy as being more definite than the unlawful agreement was in fact. But in order to constitute a criminal conspiracy to commit an offense against the United States the minds of the conspirators must have met upon some scheme which contemplated the doing of all the elements that go to make up some statutory offense, or else there is no criminal conspiracy; and if there is any "essential element of the crime omitted it cannot be supplied by intendment or implication." "The charge must be made directly and not inferentially or by way of recital, and when the criminality of a conspiracy consists in an unlawful agreement to promote some criminal purpose that purpose must be fully and clearly stated in the indictment." Thus does the Supreme Court apply the general rule touching indictments to indictments

charging conspiracy to commit an offense against the United States.

THE MEANING OF THE WORD WILLFUL AS USED IN THE SECTION OF THE REVISED STATUTES DEFINING PERJURY.

JudgeToulmin says in United States vs. Edwards, 43 Fed. Rep. at page 67:

> "That willfully means with design, with some degree of deliberation. To say that testimony was corrupt is to say that it was wicked or vicious, whereas to say that it was willful is to aver that it was given with some degree of deliberation; that it was not due to surprise, inadvertence or mistake, but to design. The statute uses the word 'willfully' and makes it the essence of the offense."

It is also said on the same page:

> "That perjury cannot be committed unless the person taking the oath not only swears to what is false or what he does not believe to be true, but does so willfully. Rash or reckless statements on oath are not perjury, but the oath must be willfully corrupt."

In the case last cited the indictment was held insufficient in that it did not allege that the false oath was taken willfully, and that an allegation that it was corruptly taken did not embrace the element of willfullness.

In the case of Spurr vs. United States, 174 U. S. 734, Mr. Chief Justice Fuller says:

> "The word 'willfully,' says Chief Justice Shaw, in the ordinary sense in which it was used in the statute means not merely voluntarily but with a bad purpose."

He further says on the same page:

"The significance of the word 'willful' in criminal statutes has been considered by this Court. In Felton vs. United States, 96 U. S. 699, it was said doing or omitting to do a thing knowingly and willfully, implies with a bad intent to do it or to omit doing it."

In Potter vs. United States, Mr. Justice Brewer, speaking for the Court says, 155, U. S. 446:

"The word 'willful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and purpose to do wrong."

In United States against Howard 132 Fed. (same case cited by defendant in error), on page 326, part of the syllabus, it is said:

"And while in an indictment for subornation of perjury caghrnini p.cood ebu taia mote rtvesf ws cmfwy shrdl under Sec. 5392, the omission of the identical word 'willful' in charging a false swearing by the witness may not be fatal, the indictment in such case must contain equivalent words, themselves free from ambiguity or equivocation. Such requirement is not met by an averment that the defendant knew at the time of the subornation that the testimony to be given by the witness was false, willful and contrary to the oath to be taken by the witness, which relates to the knowledge of the defendant and not to the state of mind of the witness."

In the case of United States against Edwards, supra, Judge Toulmin says, 43 Fed. 67:

"The statute uses the word willfully and makes it of the essence of the offense."

Again on the same page:

> "The Court being of the opinion that willfullness is an essential ingredient for the offense of perjury under Sec. 5392, Revised Statutes, it must be charged in the indictment, or the indictment will be bad."

It may be the law that the use of the word "wilful" is not absolutely necessary in a case of this kind, but if so, words of like meaning must be used so that the indictment, without ambiguity or equivocation means the same as it would have meant if the word "wilful" had been used. We submit that there is no allegation in the indictment under consideration to the effect that the plaintiffs in error intended, as a part of the conspiracy charged, that any one should wilfully take a false oath. Neither are there any words in the indictment that are the equivalent of a charge of this kind.

Defendant in error proceeds on the theory that it is charged in the indictment that the plaintiffs in error agreed together that they would procure other persons to make contracts with them to transfer to them any title that such other persons might acquire to lands under the timber and stone act, and then to take an oath before some competent tribunal that they had not done so; even then we think the indictment would fall short of charging a conspiracy to procure wilful false swearing. But in this case the indictment does not charge that the conspiracy contemplated or that it was a part of the conspiracy that any contract of the kind mentioned was to be entered into. It is said in the indictment, see page 11 of the transcript:

> "When in truth and in fact as each of the said persons would then well know and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, would then well know such persons would be applying to purchase such

lands on speculation, and not in good faith, to appropriate such lands to their own exclusive use and benefit, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner and Marion R. Biggs, by which the titles they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner."

It is to be observed that ther is no direct allegation anywhere that contracts of the nature indicated would be entered into, but the allegation is made that the defendants would know and the persons who are to be suborned, according to the allegations of the indictment, would know that such agreements had been made at the time such persons were applying to purchase the land.

There is not a hint in this indictment that at the time the alleged conspiracy was formed anybody contemplated the making of such agreement. In the brief of defendant in error it is said on page 10 that the allegation in the indictment is that the defendants then well knew that they would be applying to purchase such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit respectively. There is no such allegation in the indictment. The allegation is that the defendants would then well know, referring to a future time and not to the time of the formation of the conspiracy Neither is it charged that the defendants agreed among themselve that they would procure persons to take the oath referred to knowing at the time of the conspiracy and as a part of it that such oath would be false, or knowing that any contract was to be made.

We call the court's attention to our opening argument on this subject and we submit that the answer of defendant in error does not meet the objections we have raised.

In order that the argument of defendant in error have any point at all it must appear that the conspiracy contemplated the making of the contract referred to, when in truth and in fact the conspiracy as alleged contemplates no such thing. It will not do to overlook the doctrine laid down in the case of the United States against Peuschel, 116 Fed. Rep. 642. This case was referred to by us in our opening brief, and holds:

> "That to constitute a criminal conspiracy to defraud the United States by obtaining title and possession through homestead entry to mineral lands not subject to entry, the fact that the land contained valuable minerals and knowledge of such fact by the conspirators at the time the conspiracy was formed are essential and must be averred in the indictment. An indictment which after charging such conspiracy and the subsequent making of an affidavit, and the filing of an application for entry in furtherance thereof, avers that the defendants then and there well knew that the land contained valuable mineral deposits, is uncertain and fatally defective, in failing to charge such knowledge at the time the conspiracy was formed."

It is manifest that if the indictment was bad in the Peuschel case it cannot be held good in the case under discussion. As it is clear from this indictment that no knowledge is attributed to the defendants of the making of contracts except knowledge at the time when the applicants would be applying to enter. This point is of a like nature as the one urged in our opening brief, and we respectfully ask the attention of the court to that discussion. We do not wish to repeat our first brief, neither do we want the court to overlook it, especially concerning those matters which are not answered at all by the brief of the defendant in error.

There is no allegation that a conspiracy existed which contemplated the making of the contracts of the kind alleged in the indictment.

There is no allegations that such contracts were made. It is stated that applicants and plaintiffs in error would know that such contracts would have been made.

A statement that defendant and applicants would not believe certain matters to be true.

No allegation that defendants knew of the state of mind of applicants as to what their belief was or would be.

Defendants must be held to understand the charge only as it is unequivocally made in the indictment.

Counsel for defendant in error seem to think that plaintiffs in error should first advise themselves of what constitutes the essential elements of the crime of conspiracy to suborn perjury, then assume that the person drawing the indictment knew the law, and therefore must have intended to charge all the necessary elements, and if he did not, supply the omission themselves, and therefore not be mislead or surprised if at the trial an attempt is made to supply omissions by proof of essential elements of the offense sought to be charged but omitted. While it may not be true in fact it is at least theoretically true that the pleader is confined in his statement of fact to what the grand jury may find to be probably true and is not at liberty to insert in the indictment essential facts not found by the grand jury.

The errors complained of are errors of substance and not of form. Insufficient description and identification of the offense sought to be charged, defects which are fatal.

Defendant in error cites two cases on the omission of the word willful and these are considered later on in this brief and two cases on the use of the word "knowingly" in an indict-

ment, namely, Rosen vs. United States, 161 U. S. 33, and U. S. vs. Clark, 37 Fed. 107. While the question of the sufficiency of the indictment is considered in one portion of the argument and the omission of the word "willful" in another portion it is impossible to keep the two points separate as they are essentially one and the same.

In both of the last mentioned cases, the question was whether an indictment, under Section 3893 of the Revised Statutes, charging that defendant knowingly deposited for mailing certain obscene matter, sufficiently charged that defendant knew the matter to be obscene. In both cases the question arose on motion in arrest of judgment and in each case the indictment charges the offense in the language of the statute.

Of course, it is not conclusive that the indictment is good because the statutory language is used but as said by Justice Brewer in delivering the opinion in the Clark case, page 106:

> "There is always a presumption that the language of the statute fully describes the offense intended to be punished, and consequently that an indictment using that language also fully describes the offense."

In both cases the indictment alleged the obscene character of the matter deposited for mailing, and, in the Rosen case particularly, described it fully. In these two cases the words of the statutes describing the offense were used.

In the case now being argued the statutory word constituting the gist of the offense is omitted. In so far as the two cases may be thought to bear upon this case it may be said that it is one thing to charge a man with knowingly doing something and entirely a different matter to charge persons with conspiracy to subborn perjury and neglect to say that they conspired to have

the persons to be suborned take a *willful* false oath concerning matters which they did not believe to be true; and ask the Court to draw such inferences, as would make the indictment good, from the fact that it is alleged that the defendants and the several applicants mentioned in the indictment would in the future know that certain contracts would have been made and that defendants and the several applicants mentioned would in the future not believe certain matters to be true.

There is no allegation that the defendants at any time would know the state of mind of the applicants, but we are asked to infer such knowledge from the allegation that defendants and applicants would at some time know that they would have made certain contracts without a direct allegation that the contracts were made. This is an attempt, we submit, to draw inferences from inferences, and pile intendment upon intendment, and at last not getting even an inference that the alleged conspiracy contemplated even the foundation of the inference. Again, the question is not what would be the future state of mind either of defendants or of the several applicants, but what did the defendants at the time of the formation of the conspiracy and as a part of it intend, and this is what must be charged in the indictment, and we insist that it is not charged at all.

It is obvious that under our contention the substantial rights of the plaintiffs in error have been prejudiced by the rulings of the Court.

The other cases cited by the defendant in error are of little, if any, value, in passing upon this case. For illustration, in the case of Connors vs. United States, the Court simply held that a motion in arrest of judgment could not be relied upon to raise the question that more than one offense was stated in a single count, when the ruling did not result prejudicially to the defendant, and it was further held that the indictment charged only the single offense in the count complained of.

We pass to a discussion of the question of whether or not the absence of the word "wilful" from the indictment is fatal on the theory assumed by council for defendant in error, that the indictment charges a conspiracy to procure persons to make contracts and agreements whereby the titles which they might acquire from the United States should inure to the benefit of persons other than themselves; and that such conspiracy further contemplated that such persons should swear that they had not made such contracts.

We do not waive the position first taken by us with reference to that point, and insist strenuously that the indictment does not charge a conspiracy to have any contracts made, etc., as set out in an earlier part of our brief. If our first position is correct, of course, the indictment is bad, but if this Court should hold otherwise we still insist that the absence of the word "wilful" is fatal to the indictment. The defendant in error has cited two cases only which he claims are direct authority on the point that equivalent words may be used for the word wilful. The first case cited, Babcock vs. United States, 34 Fed. 873, is not authority for the proposition advanced. The precise point raised, in the language of Justice Brewer, is as follows (see page 876):

> "It is insisted that in no count of the indicement is it alleged that the defendant knew or believed that the parties or any of them would swear to the facts charged to be false."

The portion of the indictment quoted does not contain the word "wilful." Whether it was in the indictment or not is not fully shown by the case. Mr. Justice Brewer passes upon the question raised, namely, did defendant know or believe that the parties or any of them would swear to the facts charged to be false. In holding that this contention is not well taken it is said on the same page:

> "Take the first count for instance. It charges that the defendant did solicit, suborn and procure an unknown person assuming and pretending to be Mary L. Pratt, who then and there took an oath administered by the register; she, the said person, not believing the same to be true as he, the said defendant, then and there well knew; and that she did take the oath signed and subscribed the affidavit, not believing it to be true, all of which he well knew. Then it sets out the substance of the affidavit, and further alleges wherein it was false, and that she at the time knew it was false; and that he, knowing the same, solicited, suborned and procured her to take the oath and sign and subscribe the affidavit, well knowing the same to be untrue, and well knowing that the person falsely impersonating Mary L. Pratt well knew the same to be untrue."

It will be noticed that the charge is directly made that the defendant procured and suborned her to make the affidavit. This fully meets the objection that the defendant did not know or believe that the party would swear to the facts charged to be false. It refers to something that he had actually done, something that he had procured to be done and if the specific objection had been made that it did not appear that she wilfully took a false oath if there was ever a case where equivalents could be substituted for the word "wilful" this is one of them. It is an entirely different thing to charge what a man did do and set it out fully from what it is to charge a conspiracy and allege knowledge that might be had by the parties at some indefinite future time, especially when

it does not appear at what time they were to have such knowledge. In the indictment in the case now on trial it is nowhere directly charged that the matter was false.

The other case cited, United States vs. Howard, 132 Fed. 325, does hold, that it is not absolutely necessary to use the word "wilful" in a case of this kind, but it is put in these words on page 351:

> "I am inclined therefore to hold that, notwithstanding the obvious advantage of using the identical word used in the statute it is not absolutely necessary to use the word "wilful," etc."

In this case the judge held, however, the indictment bad for subornation of perjury where it was charged that the defendant knew at the time of the subornation that the testimony to be given by the witness was "false, willwul and contrary to the oath" to be taken by the witness.

It will be noticed that the first of the two cases cited by defendant in error refers to the state of mind of the defendant while in the last case cited it was contended and held the indictment was bad because the word "willful" was not used in describing the state of mind of the person suborned. The case under consideration is nothing like as strong a case in favor of upholding the indictment as the case of United States vs. Howard. It was contended in the United States against Howard that it followed that the oath must be a willful false oath if the defendant knew it was so because he could not know it unless such was the fact. But the Court said, page 351:

> "Now, then, while in these indictments the pleader has been careful enough to aver that Howard knew that the witness Smith, for example, had been suborned to "willfully"

swear contrary to his oath to facts that he did not believe to be true, it is going a long way upon the pathway of indulgence to permit an implication from that averment that Smith himself "willfully swore," contrary to his oath, to that to which he did not believe to be true."

The Court further says on page 349:

"The pleader has omitted this word (willful) when the statute laid open before him, and it was a plain duty, on the authorities, to have used it."

On page 353 the court says:

"For illustration, if, at the time the bargain was made by Howard with Smith for his false testimony, Smith had been, let us say, insane, so that he could not act willfully about anything, and Howard, being ignorant of the fact of insanity, should have made his bargain, in the belief, therefore, that he was acting willfully both in his bargain and would be acting willfully in delivering his testimony,it might well be said in a less rigid and narrow sense, that Howard knew he was acting willfully."

Under these circumstances it is suggested that he would escape conviction. We understand that it was not necessary in the case on trial that perjury should actually have been committed, but it is absolutely necessary to charge that the defendants conspired, and that their conspiracy involved, among other things, the notion that persons should take a willful false oath and their state of mind as to what they intended the person to be suborned should do is not stated with sufficient clearness in the indictment or as we think at all. It is not alleged in the indictment that the defendants at any time did or would know that the applicants would know that the matter that the applicants were to swear to would be false, or that the defendants at any time would know that the applicants would not believe the matter to be sworn to by them would be true.

It is alleged in the indictment, see page 12 of transcript record:

> "That the matters so to be stated, subscribed and sworn to by the said persons being material matters under the circumstances and matters which the said persons so to be suborned, instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs would not believe to be true."

It is not here alleged that the defendants would know the state of mind of the several applicants, or they the state of mind of the defendants. It is alleged on the preceding page as follows:

> "As each of the said persons would then well know and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, would then well know such persons would be applying to purchase such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit, and would have made agreements and contracts that they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, etc."

Now, we are asked to infer that the defendants knew that the applicants were taking a willful false oath and that the defendants knew the state of mind of the applicants because of having made this contract. To refer a moment to our former proposition, this is far from saying that the defendants formed a conspiracy contemplating this, that these contracts should be made.

The indictment merely charges that in the future the defendants would have made contracts and the several applicants would have made contracts not saying this is part of the conspiracy. But passing that question this indictment does not

charge and is not construed to charge that the applicants had made a contract with the defendants in the very words set out in the indictment, but according to the construction given it it chargesthat the defendants would have made a contract with the several applicants, which contract would have the effect set out in the indictment. The witness, Jeff Evans, knew what the talk was between him and the several defendants. He thought, to make an agreement or contract within the meaning of the oath that he took, the agreement must be in writing. (See page 430 of the transcript). The witness, Evans, might not have perhaps believed the affidavit which he signed according to the meaning given it by the counsel for the defandant in error, but according to the interpretation which he placed upon it he did believe it was true. (See transcript 339. 266). Other witnesses understood according to their testimony that they were making application for their own use and benefit so long as they got whatever the understanding was above the cost price, and that they made the application not for the benefit of anyone else but to benefit themselves. (See Transcript of Record, 358.) At the time of the trial of this case witnesses might be convinced that what they had said in their several affidavits were not true according to the interpretation of the technical terms placed upon their affidavits by the government officials. It does not follow that they committed perjury, or that the defendants intended that they should commit perjury. It does not appear that the defendants intended as a part of their conspiracy that the several applicants or any of them should swear willfully or otherwise to anything which they did not believe to be true. As far as these allegations are concerned the defendants might have intended to deceive every one of the applicants and make them believe that the matters to be sworn to by them should be true. They might even intend to make a con

tract with the several applicants and to have the applicants swear that no contract was made and intend as a part of the conspiracy to deceive the applicants and make them think that what they were swearing to was the truth.

We ask the Court, in undertaking to determine what the indictment actually charged, to refer to the transcript of record, and not to the brief of the defendant in error. On page 11 he says:

> "On the contrary it is specifically alleged that before applying for them he entered into an agreement with the defendants that they would apply for them in the manner prescribed by law."

We submit there is no such allegation in the indictment, either specifically or otherwise. Note what is said on page 11 above the portion just quoted. It might be true that if a person made an application to purchase, and entered into a contract by which the title would inure to the benefit of another, and if his sole purpose in applying to purchase the land was to obtain title to it in order to benefit another person and he understanding it should swear to the contrary he very likely would be taking a willful false oath. This is not the case that we have presented. The defendants must have intended to induce the several applicants to willfully swear falsely to matters which they did not believe to be true.

The only place in the whole indictment where by any stretch of the use of language it could be said the defendants intended that the applicants should swear to something which they did not believe to be true is found on page 10 and by thereupon "contrary to such oath stating and subscribing material matters contained in such declarations and depositions which they should not

believe to be true." As suggested in our first brief, "should" means "ought," and nothing more here, and it refers to some time in the future that is utterly vague and uncertain, and it does not appear whether they actually intended they should believe the matters untrue when they took their oath or at some future time,and this allegation, under any construction placed upon the indictment, is not sufficient. We submit that the indictment cannot be said to charge that the defendants intended that the applicants should willfully swear falsely by reason of an allegation in the indictment that the defendants and the several applicants would know at some future time that the applicant would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts, etc.

We wish to say a word concerning the contention made by the defendant in error on pages 32, 33, 34, 35 of the brief of defendant in error. He seeks to avoid the inevitable conclusion that the defendant was surprised by the construction of the indictment, at the last trial, to the effect that it charged that the subornation of perjury was to be committed at the time of final proof as well as at the time of the application to purchase. The fact that there appears to be no objection to the final proof testimony of applicant B. F. Jones is of no importance. Note that it is called final proof testimony so that there is no doubt as to what is meant. Nobody could confuse that with his application to purchase. The plaintiffs in error were not estopped from raising this question if it is a fact that they did not object to the final proof testimony of one claimant. Neither does it follow that their objection to the form of the indictment describing the application to purchase or sworn statement is an admission that

the indictment well charges something else, namely, that perjury was to be suborned at the time of final proof. The word "deposition" in its technical meaning does not describe any testimony used either at the time of final proof or at the time of making the application to purchase. A deposition is a paper to be used in legal proceedings taken upon notice to the adverse party, etc. The defendant in error has answered his own argument with reference to this when he contends that the word "deposition" is broad enough as used in the statute defining and punishing perjury to include all written testimony, including affidavits and sworn statements.

THE INDICTMENT DOES NOT CHARGE THAT PERJURY WAS TO BE COMMITTED BY APPLICANTS AT TIME OF FINAL PROOF.

The law so far as the timber and stone act is pertinent to the matter now under discussion may be found on page 66-67 of first brief of plaintiffs in error.

See also Compiled Statutes 1901, Volume 2, page 1545. It is now contended by defendant in error that this indictment not only charges that perjury was to be suborned not only when the preliminary papers were filed, but at the time of final proof. This contention is made in the face of the fact that at the first trial no such contention was made.

We understand that counsel is now saying that this contention was made at the time of the first trial, but it was not. For a full statement upon that subject see our first brief on this question. Counsel now contends that not only does the indictment charge that perjury was to be suborned at the time of final proof, but that the indictment is a peculiarly well drawn pleading in expressing that idea.

If well drawn it must be *peculiarly* so, as it was not until the third trial that the interpretation now contended for was placed upon it. An indictment is certainly peculiarly drawn if it definitely means only one thing, and at the same time misleads judges learned in law as well as counsel for both plaintiff and defendant.

It is argued that the contention of plaintiffs in error in this matter is based on their lack of knowledge of the technical terms used by officialdom. See page 18 of brief of defendant in error.

If the contention so made is the truth then the indictment is bad and the demurrer to it should have been sustained.

See United States vs. Reichert, Fed. Rep., Volume 32, page 147, wherein Justice Fields says:

> "An indictment is to be read to the accused unless the reading is waived. The language should therefore be so plain that one of ordinary intelligence can understand its meaning. For that purpose, common words are to be used as descriptive of the matter. Abbreviations of words employed by men of science or in the arts will not answer, without full explanation of their meaning in ordinary language. The use of the initials A. D. to indicate the year of our Lord is an exception because of its universality. Arabic figures and Roman letters have also become indicative of numbers as fully as words written out could be. They are of such general use as to be known of all men. They, therefore, may be employed in indictments. But the initials here have reference to the public lands as marked on the public surveys; they are signs used in a particular department of public business, and are not matters of general and universal knowledge by all speakers of the English language."

An argument of the defendant in error is based on the meaning of the words "declaration and deposition" as used in the indictment, and certain words used in the blank forms furnished by the commissioner of the General Land Office. The indictment undertakes to describe the proceedings in which, the time when and the place where perjury was to be suborned, and is as follows. See pages 9, 10 and 11, Transcript of Record:

> "That is to say to suborn, instigate and procure the said persons respectively to come in person before him, the said Marion R. Biggs, who was then and there a United States Commissioner for the District of Oregon, and, after being duly sworn by and before him, the said Marion R. Biggs, as such United States Commissioner, to state and subscribe under their oaths that certain public lands of the United

States lying in Crook county in said District of Oregon, open to entry and purchase under the Acts of Congress approved June 3rd, 1878 and August 4th, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons respectively, and that they had not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs would then well know, such persons would be *applying to purchase* such lands on speculation."

It is manifest that the indictment charges only one time as the time when perjury was to suborn. If at different times it would have been so stated. Further, the words "then and there" are used further on in the indictment as referring to one time. The question arises, when does an applicant apply to purchase. We answer when he files his written statement in duplisate, as provided by Section 2. This section is preceded by the heading, "Application for purchase of Timber and Stone Lands, etc." This shows conclusively that the written staatement therein referred to (which is the preliminary paper) is the application to purchase, and again in this Section 2 it is provided that this statement must be verified by the *applicant*, and among other things, he must take his oath that he does not *apply to purchase* the land on speculation. Clause 3 of the Timber and Stone Act provides for final proof.

The only *act of application to purchase* on the part of the applicant is the execution of the application to purchase provided for in Section 2

It is to be noted further that the pleader has copied the very matter provided by law as found in Section 2 and alleges that the subornation of perjury consisted in the procuring of a false oath as to those very matters. It is significant that the pleader does not allege in the indictment that the subornation of perjury was to consist of swearing falsely to the very matters contained in the final proof, if he had in mind that the subornation of perjury was to take place at that time. Note the questions at the time of final proof concerning the matters and things touching which perjury was to be committed. Q. 13, page 288 in the testimony of claimant John S. Wadkins:

> "Have you sold or transferred your claim to this land *since making your* sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner with any person whomsoever, by which the title which you might acquire from the United States may inure in whole or in part to the benefit of any person except yourself."

And the questions following on page 289, Nos. 14 and 15.

The pleader copies the very things that the applicant must swear to in his application to purchase as provided in Section 2, and alleges that the applicant was to swear falsely concerning some of those matters. It is not charged in the indictment that any false testimony was to be given concerning matters which the law provides under Section 3 shall be established at the time of final proof. If the pleader had in mind matters that some rule provides for the proof of at the time of final proof, would he not have referred to that mater clearly and identify it by the very words that the form makes use of in demanding proof of these matters?

The only words used in Section 5392 referring to testimony other than that orally given are: "Any writen testimony, declaration, deposition or certificate." The pleader in drawing this indictment made use of the word declaration and deposition, and it is argued because these words are connected by the conjunction "and" instead of the disjunctive "or" that he had in mind two different papers. It is submitted that the universal way of drawing indictments is to charge in the conjunctive instead of the disjunctive, so as to have the meaning broad enough in any event. If the pleader had wished to identify the papers by some name that would have been descriptive he could have done so provided he used any word that would be covered by the statu tory words as found in Section 5392. The words used by the statute are general.

In United States vs. Clark, 1st. Gall. 497, it is said:

> "The usual and ordinary meaning of the word 'deposition' is written testimony in legal proceedings."

As stated in the case of United States against Ambrose, 108 U. S. 340, cited by defendant in error, it is held that the words "declaration and certificate" are used in the ordinary and popular sense and signify any statement of material matters of fact sworn to and signed by the party charged. That they are words not used as terms of art or in any technical sense. It follows that the meaning of both of these words is so general that the use of either one of them would have covered affidavits and depositions, and consequently the meaning is so general as to be descriptive of no particular paper, and we are left to determine what is referred to in the indictment by other means. Again, if one refers to the papers furnished by the Land Office he finds the paper to be executed at the time of final proof, headed "testimony of

claimant," not deposition of claimant. See page 286 transcript of the record. On page 289 in the certificate signed by the United States Commissioner is found this expression: "That I verily believe affiant to be the person he represents himself to be." One might think from the use of the word affiant that the foregoing was an affidavit. Further on, on the same page in the note it is said:

> "Every person swearing falsely to a deposition is guilty of perjury."

The application to purchase as provided for in Section 2 of the Timber and Stone Act is called a "Sworn Statement" in the heading of the form used by the department. Further on the person signing the statement is made to depose as though he was a deponent in a deposition. The paper called the "Sworn Statement" in its heading, being the preliminary paper filed, is referred to as an affidavit in the certificate signed by the commissioner. See page 226 of Transcript of Record. The question recurs, Why did not the pleader describe these papers by some name that would identify them if he was seeking to identify the papers by name? From the foregoing it is seen that one is not aided in construing the indictment by the use of the alleged technical terms used by the Land Office Department in describing the application to purchase and the final proof papers. We submit that it is entirely clear that the pleader used the words "declaration and deposition" in a general way so as to have terms broad enough that would cover all written testimony, and that he relied upon other means to identify and point out the time when and the place where the perjury to be subborned was to be committed.

It is argued on pages 28 and 29 of brief for defendant in error that because, as alleged in the brief, the preliminary paper

in pre-emptions is called a declaratory statement, that the word "declarations" in this indictment refers to the preliminary paper in applications to purchase under the timber and stone act. It is also said that the pleader evidently had this in mind, and therefore referred to the application to purchase as a declaration. We submit that this contention is utterly devoid of merit. He used the word "declaration" because he found it in the statute defining perjury, and he used it in its generic sense as including all papers the decisions have held it to include. It is contended on page 30 of the same brief that no word used in the statutory definition of perjury will cover a simple affidavit unless it be the word "declaration," and again it is said page 22 that the word deposition in its generic meaning includes an affidavit. From the brief of the defendant in error it appears that the popular meaning of either "declaration or deposition" would include affidavit, and that the popular meaning is the one to be given to these words. It follows that if a pleader wished to describe and identify a paper by its name, it being a paper that fell within the meaning of either declaration or deposition, he would give it its specific name; and it is further apparent that in all cases where subornation of perjury is charged with reference to such paper, the proceedings would be identified where the perjury was to take place, as in this case.

Under the pre-emption act the pre-emptor was required by the law to file a written statement describing the land, "declaring his intention to claim the same," hence the form furnished was headed declaratory statement. The declaratory statement of a pre-emptor is as follows:

(No. 4-535)

PRE-EMPTION DECLARATORY STATEMENT FOR UNOFFERED LANDS.

I,....., of....., being....., have, on the..... day of....., A. D., 1900, settled and improved the.....quarter of Section No..... in township No.....of range No..... in the districts of lands subject to sale at the land office at..... and containing..... acres, which land has not been offered at public sale, and thus rendered subject to private entry, and I do hereby *declare my intention* to claim the said tract of land as a pre-emption right under section 2259 of the Revised Statutes of the United States.

My postoffice address is.....

Given under my hand this..... day of.....A. D., 190.....

.....

In the presence of.....of..... and.....of.....

This is not even sworn to and it is nothing but a declaratory statement. In it the claimant furnishes no proof and it is utterly unlike the application to purchase or the initial paper under the timber and stone act. If the mind of the pleader was searching for a name by which to designate and identify a paper that was to be filed in a timber claim, why did he not refer to it as a sworn statement, or if he wished to enlarge upon the description, why did he not refer to it as an affidavit called by the officials of the Land Department "A Sworn Statement," and by the statute an application to purchase?

He certainly was not ignorant of the technical terms used by the officials of the Department.

It, of course, is not necessary to use the general word declaration or deposition in an indictment. In fact the word declaration is so general in its meaning that it fails to describe a paper. And

if one wishes to identify a paper by name its specific name should be given.

That any one drawing an indictment should attempt to secure a name for a paper referred to and finally give it the name of a paper filed under an entirely different act and for an entirely different purpose when the paper which he wished to identify had a name of its own is very difficult to understand.

Or, to be more accurate and specific, it is difficult to understand why the pleader in this case should use the word "declaration" to identify the initial papers in timber and stone claims when such papers have a specific name, simply because the word declaration in a modified form only is found as a part of the name given to the initial paper in a pre-emption claim.

It is manifest that he used the word "declaration" because it is found in Section 5392 defining perjury and that he used the word in its popular and generic meaning.

We fail to see why it was thought necessary to resort to such an argument as this, as it is obvious that no one would be convinced by it and its inferences are so baseless that it weakens a proposition already incapable of being maintained.

The question is what does indictment mean, and is it certainly a question of some interest what did the accused understand it to mean. The defendants in this case are not compelled to resort to any such argument in order to discover the meaning of this indictment, and if they did they would not agree to the conclusion arrived at by counsel for the defendant in error.

It is said on page 29 of brief for defendant in error that the preliminary paper in a timber and stone act is a declaration of notice because the applicant therein "declares his intention to pur-

chase" the land under the timber and stone act. This is not true The words "declares his intention to purchase" are not to be found therein. On page 27 of the same brief it is said in substance in the very nature of things the conspirators must have intended to induce persons who applied to purchase the land to swear falsely, not only in the preliminary paper, but likewise in giving testimony at the time of making final proof as it was obviously the purpose of the conspirators to obtain title to the lands, and the pleader must have had these facts in his mind. We are not concerned with the facts that the pleader had in his mind, but we are only concerned with what is expressed in the indictment and can be found therein by any fair construction. The indictment undertakes to charge a conspiracy to suborn perjury. There is not a word in it to the effect that the defendants conspired to acquire title to land, but as far as any allegation is concerned in the indictment the ultimate purpose of the defendants was to secure a large number of people to commit perjury. It is submitted that the words, declarations and depositions were used in the indictment in their popular sense, and that they were connected by the conjunction "and" so that all possible kind of papers that might be sworn to would be included.

It is urged (page 19 brief of defendant in error) that because it is provided in Section 3 of the timber and stone act that upon the filing of such "statement" notice shall be published for a period of sixty days, and that after the expiration of said sixty days "if no adverse claim shall have been filed the *person desiring to purchase* shall furnish to the register," etc, that the person "desiring to purchase" is merely "applying to enter and purchase." It is charged substantialy in the indictment that at the time perjury was to be suborned each of the persons to be

suborned would then well know and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, would then well know such persons would be applying to purchase said lands on speculation.

That is the persons to be suborned would be applying to purchase the land when the false oath was to be taken. Is it true that "the person desiring to purchase" means the same as the person applying to enter and purchase, or the person applying to purchase? The expression "desiring to purchase" is descriptive of the state of mind of such person, but does not describe the act, while the expression of applying to purchase refers to an act as does the expression applying to enter and purchase.

It is manifest that the pleader referred to one and the same act by using the words "applying to enter and purchase" as used in one place in the indictment and the expression "applying to purchase" in another place in the same instrument.

The indictment in fixing the time when and the proceedings in which the alleged perjury was to be suborned refers to an *act* and the only time when it is alleged that defendants and the persons to be suborned would know the matters sworn to to be false is when such persons would be applying to purchase.

When did they apply to purchase? The answer compels us to repeat.

Section 2 of the timber and stone act has this heading: "Application for purchase of timber and stone lands: false swearing: penalty."

What is done by a person in conformity with said Section 2 is therefore named an application to purchase.

In the affidavit filed in conformity with Section 2 the affiant uses these expressions: "That deponent has made *no other application under this act.*" "That he does not *apply to purchase* the same under speculation."

This section also provides that the statement must be verified by the oath of the "applicant."

It seems obvious that the initial paper under the timber and stone act is called by the statute an application to purchase, the person executing it, the applicant.

It follows that when he is executing such a paper he is applying to purchase and applying to purchase and enter. Section 3 of said act provides what shall be done after a person has applied to purchase and is headed "Publication of Application for Purchase; Proof," etc. This third section provides for the publication of an application to purchase, not the making of it and for final proof. In so far as it provides for the publication of an application to purchase it refers to what has already been done.

The initial papers and final proofs are so distinct, both in substance and time of filing in matters before the land office, that if the intention was to refer to both, such intention would be made plain.

Under Section 3, if a person still desires to purchase he should comply with Section 3, but he does not apply to purchase a second time.

If a person having applied to purchase no longer desires to purchase he may abandon his application. It is obvious that a person may be an applicant and not be applying to purchase. He must be making an application to purchase in order to be applying to purchase, but after such application to purchase is made he may be an applicant although he is performing no act.

In such case he is an applicant by reason of something heretofore done.

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT MIGHT BASE A CONVICTION ON A CONSPIRACY TO SUBORN PERJURY AT THE TIME OF FINAL PROOF, AND IN ADMITTING EVIDENCE TENDING TO SHOW SUCH A CONSPIRACY, AND IN ADMITTING EVIDENCE TENDING TO SHOW THAT SEVERAL PERSONS SWORE FALSELY CONCERNING MATTERS AND THINGS NOT REQUIRED TO BE PROVED AT THE TIME OF FINAL PROOF OR AT ANY OTHER TIME BY A STATUTE OF THE UNITED STATES, BUT ONLY BY A RULE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

We shall not at first discuss the question of whether or not the regulation made by the Commissioner of the General Land Office relative to matters to be proved at the time of final proof under the timber and stone act is reasonable, but we now confine ourselves to the general question of whether or not a *regulation* made by a head of a department is a *law* of the United States in the sense than an act committed or omitted in violation of such a regulation, either forbidding it or commanding it is a *criminal offense*. To be exact, our contention is that such *regulation* is not a *law* of the United States within the meaning of the phrase as used in Section 5392 defining perjury.

As noted in our former argument, Section 3 of the timber and stone act provides what shall be proved at the time of final proof in order that a patent may issue to the applicant, and it

nowhere provides for the testimony called for in the rules of the Commissioner of the General Land Office concerning which it is alleged plaintiffs in error conspired to have perjury committed.

It is nowhere provided by statute that the applicant shall submit proof *at any time* that he has made no contract *since making or filing his sworn statement,* whereby the title which he may acquire shall inure to the benefit of any other person or persons.

The sworn statement provided for by statute under Section 2, which is the initial paper of the applicant, contains all of the matters and things concerning which it is alleged that false oaths were to be taken.

The regulation under discussion calls for proof of matters in order that a patent may issue which the statute does not provide for, and it in consequence adds to the statute, prescribes conditions not provided for by Congress and is legislation pure and simple.

In order to be guilty of a conspiracy to suborn perjury, plaintiffs in error must have conspired to have some person commit the crime of perjury, namely, take an oath before a competent tribunal officer or person in a case in which a *law of the United States* authorizes an oath to be administered, that he will testify, etc., truly and then wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true.

See Section 5392, Revised Statute.

The question is, is the regulation under discussion, requiring matter additional to that required by statute to be sworn to at the time of final proof *a law of the United States,* within the

meaning of the term as used in Section 5392 of the Revised Statutes defining perjury. If such regulation is not a law of the United States within the meaning of the phrase in that section, our contention is correct.

In support of the proposition that we are now making we cite the following self-explanatory letter of the Secretary of the Interior to the Speaker of the House of Representatives, transmitting a communication from the Commissioner of the General Land Office, together with the proposed amendment to Section 5392, of the Revised Statutes defining perjury and prescribing a penalty.

"House of Representatives

59 Congress 1st Session — Document No. 219

PENALTY FOR PERJURY IN EXECUTION OF PUBLIC LAND LAWS.

LETTER
from
THE SECRETARY OF THE INTERIOR,
Transmitting
With the communication from the Commissioner of the General Land Office, the draft of a bill to amend the law relating to perjury.

December 15, 1905.—Referred to the Committee on the Public Lands and ordered to be printed.

Department of the Interior,
Washington, December 13, 1905.

Sir: I have the honor to enclose the draft of a bill "To amend Section 5392 of the Revised Statutes," and to recommend that it be enacted into a law.

Accompanying the draft is a letter in relation thereto from the Commissioner of the General Land Office.

Very respectfully,

E. A. HITCHCOCK,

Secretary

The Speaker of the House of Representatives.

Department of Interior

General Land Office.

Washington, D. C., November 25, 1905.

Sir: Your attention is partciularly invited to the following quotation from my last annual report relative to the amendment of the statute prescribing punishment for perjury:

Section 5392, Revised Statutes, provides that every person falsely swearing under any oath administered "in any case in which the laws of the United States authorizes an oath to be administered" shall be guilty of perjury. In the execution of the public land laws it is imperatively necessary that certain facts be established by oaths which are not specifically required by the laws of the United States, but are required by departmental regulations or orders—oaths essentially necessary in disposing of the public lands. It has been repeatedly held that a charge of perjury cannot be based upon an affidavit required only by departmental regulations.

The necessity for such an amendment is clearly apparent from the decision of the court in the case of United States v. Maid. (116 Fed. 650). Section 2302, Revised Statutes, declares that mineral lands shall not be liable to settlement or entry under the homestead laws. It therefore becomes necessary for this office to have evidence as to the nonmineral character of the lands applied for by a homesteader, and to meet that necessity each applicant has been required by Department regulation to file with his application an affidavit that his lands are agricultural in character and contain no mineral. Maid was indicted, in the above case, for swearing falsely to this affidavit, and the court held that he could not be punished, because he was not required by statute to make such an affidavit. Sections 2290 and 2291 require a homesteader to swear to certain specified facts, but the nonmineral character of the lands is not one of the facts there specified, and for that reason an applicant may with impunity swear falsely as to that fact, and leave the Office at his mercy in its attempts to protect the Government against fraudulent entries.

Other instances might be mentioned and other decisions cited, but this case serves to fully illustrate the situation and demonstrate the necessity for an amendment of this statute, since there are very many instances in which all officers of the Government must rely upon oaths not specifically required by any statute.

It is therefore respectfully suggested that this matter be called to the attention of Congress, with appropriate recommendations as to the passage of a bill along the lines of the proposed draft herewith submitted.

Very respectfully,

W. A. RICHARDS,

Commissioner.

A Bill to amend Section fifty-three hundred and ninety-two, of the Revised Statutes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congres assembled, That section fifty-three hundred and ninety-two of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

Revised Statutes, Sec. 5392. Every person, who, having taken an oath before a competent tribunal officer, or person, in any case in which a law of the United States or any regulation or order issued pursuant to law by the head of any department, bureau, or office of the Government of the United States, requires or authorizes an oath to be administered that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed is true wilfully and contrary to such oath states ar subscribes any material matter which he does not believe to be true, is guilty of perjury and shall be punished by a fine of not more than two thousand dollars and by punishment at hard labor not more than five years and shall moreover, thereafter, be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The case cited by Commissioner Richards, in the foregoing communication, 116 Fed. 650, is very instructive as it meets squarely several of the contentions made by the defendant in error. Maid was indicted under Section 5392 for swearing falsely to a non-mineral affidavit in a homestead entry.

Section 2302 of the Revised Statutes declares that mineral lands shall not be liable to settlement or entry under the homestead laws, so the declared policy of the law was not to allow entries of mineral lands by homesteaders, hence the propriety of a regulation providing for a non-mineral affidavit in this kind of an entry. The statute, however, prescribes what proof should be sufficient for a homesteader and it nowhere provides for a non-mineral affidavit, hence the only authority for administering the oath to such an affidavit was the authority of the Commissioner to make rules, and his rules providing for such an affidavit. The Court, nevertheless, held that the statute could not be added to for criminal purposes by a departmental regulation, and it therefore was not perjury for a person to swear falsely to a non-mineral affidavit in a homestead entry, as a criminal offense against the United States cannot be predicated of a violation of a requirement imposed only by a rule or regulation of one of the executive departments of the government. The case of the United Staes against Maid is decisive of the case on trial. In the course of the opinion Judge Wellborn refers to several cases cited by the defendant in error and shows why they are not applicable in the case of the United States against Maid, and also why they are not applicable in this case.

In fact the opinion in the Maid case settles every contention, on the point under discussion, in favor of plaintiffs in error, and both Secretary Hitchcock and Commissioner of the General Land Office Richards, concur in that opinion.

The case of Eaton against United States 144 U S 677, Book 36 L Ed p 591, is cited by us in our first brief and commented on by the defendant in error. The defendant in error at page 03, undertakes to avoid the force of the decision by saying, among other things, that in the Eaton case a person could commit the alleged offense without any affirmative or willful or corrupt act on his part. Eaton was a wholesale dealer in oleomargarine, being engaged in carrying on that business and under the allegations of the indictment he willfully failed and neglected to keep the books, and make the returns prescribed by the regulations made by the Secretary of the Treasury in that particular. Section 18 of the act provides that if any manufacturer of oleomargarine, any dealer therein, or any importer or exporter thereof shall knowingly or wilfully *omit, neglect* or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, etc., he shall be subject to a penalty. The act prescribes the same penalty for a person knowingly or wilfully omitting to do something prescribed as it does for knowingly or wilfully doing something that is prohibited.

Eaton by engaging in the business of dealing in oleomargarine became subject to the law concerning that matter and the rules and regulations made in pursuance of law, and there is no distinction between a sin of commission and omission in this particular and that such an argument should be used indicates the weakness of the contention being made by the person using it. Section 20 of the act above referred to (24 Statutes at Large 212) provides:

> "That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury may make all needful rules and regulations for the carrying into effect of this act."

In compliance with the authority thus conferred, he made rules as follows:

> "Wholesale dealers in oleomargarine will keep a book (form 61) and make a monthly return on form 217, showing the oleomargarine received by them and from whom received; also the oleomargarine disposed of by them and to whom sold or delivered."

Eaton being a wholesale dealer in oleomargarine willfully neglected to observe the rules above mentioned and he was indicted and charged with a violation of these rules, and here it might be noted that if the pleader in the indictment in the case on trial had wished to specify the time of final proof as the time when perjury was to be suborned he would have in all probability referred to the rules covering the case.

The Court says on page 593 L Ed:

> "But although the regulation above recited may have been a proper one to be made under Section 20 of Aug. 2nd, 1886, yet the question to be determined in this case is whether or not a wholesale dealer in oleomargarine who knowingly and willfully fails and omits to keep the book and make the monthly return prescribed in the regulation of the Commissioner of Internal Revenue, thereby fails and omits within the meaning of Section 18 of the act to do a thing 'required by law in the carrying on or conducting of his business' so as to be liable to the penalty prescribed by that section."

The question that the Supreme Court of the United States passed upon in the Eaton case then was this: Admitting that the regulation was a proper one to be made were the things required by the regulation, things required by law, so that the violation of the regulation made the party violating it subject to a penalty in criminal proceedings.

The court referring to the case of Morrill vs. Jones, 106 U S 466, which is also discussed in our first brief, which was a civil proceeding, says:

> "Much more does the principal therein announced apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted in violation of public law, either forbidding or commanding it."

In the Eaton case a regulation of the Department was violated by his willfully failing to do what the rule commanded him to do, but he was subject to no penalty because, although re-required by the *regulation* to do the thing he was not required by *law* to do it.

In this case Section 2 provides just exactly what an applicant shall do with reference to the matters concerning which it is alleged perjury was to be committed, and if Congress had desired proof like what the rules prescribed it would have provided for it and fixed the penalty.

In re Kollock, 165 United States 533, L. Ed., Book 41, page 813, is cited by defendant in error in support of the contention that he is making, and we submit that the case is authority against his contention and not in support of it, and is a good illustration of the distinction that we are seeking to draw. We wish to note also that Kollock was convicted for *failing to do something;* being a retail dealer in oleomargarine he handled it without having the packages containing it marked and branded as the Commissioner of the Internal Revenue with the approval of the Secretary of the Treasury had prescribed.

The point to be noticed is this. By the terms of the act manufacturers of oleomargarine are required to pack it in wooden packages, marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, and all sales by manufacturers and wholesale dealers must be in original stamped packages.

Retail dealers are required to pack the oleobargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury shall prescribe.

Section 18 of the act provides a penalty, if any manufacturer of oleomargarine or any dealer, or any importer or exporter thereof shall knowingly or willfully neglect or refuse to do or cause to be done any of the things required by law in the carrying on or conducting his business, or shall do anything by this act prohibited.

For the statutory law see statement of Chief Justice Fuller on pages 527, 528, 529 and 530.

The law, by its terms, provides that a person engaged in the business of Kollock should pack his product in wooden packages, marked, stamped and bronded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. The statute also provided a penalty for omitting to do anything required by law or do anything by the act prohibited, and the court held that the act of Aug. 2nd, 1886, the one above refered to, sufficiently defines the offense by requiring the packages to be marked and branded, prohibiting the sale of packages that are not and prescribing a penalty for sales in violation of its provisions, leaving the mere description of particular

marks, stamps and brands to be determined by those officers, saying at the close of the opinion on page 537, and "we are of the opinion that leaving the matter of designating the marks, brands and stamps to the Commissioner with the approval of the Secretary involve no unconstitutional delegation of power."

On page 533 it is said:

> "We agree that the courts of the United States in determining what constitutes an offense against the United States must resort to the statutes of the United States enacted in pursuance of the constitution. But here the laws required the packages to be marked and branded, prohibited the sale of packages that were not, and prescribed the punishment of sales in violation of its provisions; while the regulations simply described the particular marks, stamps and brands to be used. The criminal offense is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail."

This decision is in line with other decisions and while not directly deciding the contention that we are making, it, by inference and analogy, is conclusive that the proposition we are making is correct.

It is argued by defendant in error that the Court in the Kollock case points out a difference in effect between willfully omitting to do something commanded by a regulation and willfully doing something prohibited by it; there is no difference of the nature claimed. If one is a crime the other is. In the Kollock case, he being a dealer in oleomargarine willfully failed to brand the product. In the Eaton case, he being a dealer in oleomargarine failed to keep the books and make the returns provided for by the regulation. The Court in the Eaton case held that Eaton was not guilty because he had willfully omitted no duty required by law. But Kollock was held guilty, although his sin was one

of omission, and he was held guilty because in the opinion of the Court his act was a violation of the statute, which provided that dealers in oleomargarine should make and stamp their product, etc., and prescribed a penalty for failure so to do, leaving the detail of what the distinguishing stamp should be to the Commissioner of Internal Revenue who was to act with the approval of the Secretary of the Treasury. In failing to make and brand his product Kollock violated the statute because the statute provided that it should be marked and branded, and provided a penalty for failing to do so.

In the Kollock case the Court says, referring to the case against Eaton, page 535:

> "In that case the wrong was in the violation of a duty imposed only by a regulation of the Treasury Department."

Eaton carried on the oleomargarine business in violation of the regulations of the Department and when any reference is made to the case by a statement of the facts in any decision there is no point attempted to be made because he failed to do something required by the regulation instead of doing something prohibited by it. To recapitulate, in the Eaton case defendant dealt in oleomargarine and willfully failed to keep the books and make the returns required by a regulation. The statute prescribed a penalty for wilfully failing to do a thing *required by law* or willfuly doing a thing prohibited by it. Eaton was held not guilty because in failing to doa thing required by the *regulation* he had not failed to do a thing required by *law*. In the Kollock case, Kollock dealt in oleomargarine and failed to brand his packages and was held guilty because the law itself provided that such packages should be branded and prescribed a penalty for failing to do so. The regulation involved merely dealing with the kind of a brand to be placed upon the packages.

It was not left to the head of any department to determine whether packages of that sort should be branded or not, or whether there should be a penalty for failure so to do. The provisions of the law covered both points.

The statute itself described the offense and affixed a penalty. It is said by counsel on page 65:

> "In the Eaton case it was held that the mere 'neglect' to do a thing required by a regulation made by the president or a Department could not be made a criminal offense where the statute did not distinctly make the 'neglect' in question a criminal offense. The Supreme Court pointed out the obvious fact that the mere 'neglect' to do something required by a Department was a far different matter than is a case where no violation of the regulation is charged, and wherein the contrary the party committed the offense by complying with the regulation and in violating an express statute defining his crime while doing so."

By the last part of the above question we understand that counsel means to say that if a person takes a false oath at the time of final proof in a timber and stone entry and swears falsely concerning matters that are provided to be proved only by a regulation of a department then he would be guilty of perjury, and that persons conspiring to have him do so would be guilty of conspiracy to suborn perjury. A person is guilty of perjury only when he takes an oath where a law of the United States authorizes the same to be administered. He is guilty of a conspiracy to suborn perjury only when the conspirators intend that a willful false oath should be taken in a mater where a law of the United States authorizes an oath to be administered. It follows then that a person complying with the regulation under discussion and swearing falsely with reference to the matters concerning which the oath is administered violates no express statute defin-

ing his crime, namely 5392 defining perjury, unless the regulation is a law of the United States because the offense defined and punished in 5392 is willful false swearing in any case in which a *law of the United States* authorizes an oath to be administered. Note the amendment which Secretary Hitchcock and the Commissioner of the General Land Office have requested Congress to make, an amendment which would make Section 5392 provide a penalty in case a person should take a willful false oath in any case in which a law of the United States *or any regulation or order issued pursuant to law by the head of any department, bureau or office of the government of the United States* requires or authorizes an oath to be administered.

The proposed amendment indicates clearly in the judgment of the persons proposing it, (and their judgment is founded upon decided cases) that a *regulation* authorizing or requiring an oath is not the same thing as a *law* of the United States authorizing an oath.

Counsel's argument in this particular is without foundation. He says that a person complying with a regulation violates an express statute, namely, 5392, when one can violate 5392 only by taking a willfull false oath in a case where a *law* of the United States authorizes an oath.

That is he admits that the oath is authorized by a regulation only, and in taking a willful false oath authorized by a regulation only, counsel contends that one violates an express statute which cannot be violated unless the oath is authorized by a *law* of the United States.

We quote again the closing remark in the decision in the Eaton case page 594 L. Ed.:

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfuly to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distintly make the neglect in question a criminal offense."

In the Maid case above cited the regulation required a non-mineral affidavit in a homestead entry, but as the law of the United States did not authorize such an oath, a person (to use expression in the brief of defendant in error) complying with the regulation concerning the non-mineral affidavit did not violate Section 5392 defining perjury because the regulation is noa a law within the meaning of the word as used in Section 5392. In this connection it is to be noted that the regulation although made in pursuance of law is not a law of the United States within the meaning of theword as used in 5392 of the Revised Statutes, and it is so held in the Eaton case, and in the Maid case, and inferentially in the Kollock case, or to put it a little more accurately, in the Eaton case, it was held that the regulation there under discussion, although properly made, requiring dealers in oleomargarine to keep certain books and make certain returns,did not come within the meaning of that particular statute which prescribed a penalty for omitting to do the things *required by law* or doing the things prohibited by law.

We now cite some cases which further ilustrate the principal that we are contending for, and which are valuable because of the reasoning of the judges and their comments as to what the various cases cited by both parties in this argument hold. The cases which we wish to cite now are those of the United States vs. Blasingame, 116 Fed. Rep., p. 651, and the recent case of the

United States against Matthews, 146 Fed. 306. These cases arise under the same act. In the last mentioned case the defendant was indicted for having wrongfully and unlawfully and wtihout permit required by law and regulations made by the Secretary of Agriculture grazed sheep on the Mt. Rainier Forest Reserve. The act, which is sufficiently set out on the page of the Reporter referred to, provides:

> "The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations, and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."
>
> Act June 4, 1897, c 2, 30 Stat. 34 (U S Comp St 1901 p 1540)

It will be observed that this act undertakes to prescribe a penalty for a violation of the provisions of the act, and also for a violation of the rules and regulations made pursuant to the authority conferred, and it differs from the case under discussion in many ways, and particularly because the law provides a penalty for an infraction of the rules and regulations, and in a general way defines the offense by indicating the subject matter of the regulations. The intent of Congress to punish infractions of the rules made is apparent. While there is absolutely no such expression of intent on the part of Congress in the case being heard. This act has been held unconstitutional by district judges several

times in so far as it undertakes to confer upon the Secretary of the Interior power to make rules and regulations, the infraction of which is punishable as for a crime.

Note the distinction between these cases and the Kollock case In the Kollock case, the law provides that the dealer in oleomargarine should mark the packages containing it, and provided a penalty for his failure to do so, and delegated to the head of a department the power to prescribe the kind of mark and brand to be placed upon the packages. It did not leave to the discretion of the head of a department whether the packages should be marked and branded or not, but it described an offense and declared its punishment. In the Matthews case it is left to the judgment and discretion of the Secretary of the Interior to make rules and regulations; just what those rules and regulations would cover, what they would provide, no one could say in advance except that they would be such rules as would in the judgment of the Secretary insure the object of the reservations, etc. Hence it is held that the authority to legislate was sought to be conferred upon the Secretary of the Interior, and that such rules and regulations when so made are invalid to the extent that a person is not criminally liable for an infraction of such rules.

It is not held in the Matthews case that the rules and regulations so made may not be enforced in a civil proceeding and as a matter of fact the judge rendering the opinion in the Matthews case upholds bills praying for an injunction to prevent the grazing of sheep on the reserve in violation of rules so made. The government ought to be able to establish rules and regulations for the management of its property so that the property can be managed in accordance with the will of the owner without calling upon Congress to pass an act governing the management of such property.

It does not follow, however, that the violation of a rule so made would subject the person guilty of the infraction to a criminal prosecution.

Much has been said in the brief of defendant in error concerning the case of United States against Bailey, 9th Peters, 238, 9 L. Ed., 113, and Caha vs. United States, 152, U. S. 211 (38 L. Ed. 415). Notwithstanding the fact that the Bailey case was discussed somewhat fully in our opening brief, we wish to call the Court's attention to the case again and we submit that it is not an authority in support of the contention made by the defendant in error.

Bailey was indicted for false swearing under Section 3 of an Act of Congress of March 1st, 1823, which provides:

> "That if any person shall swear or affirm falsely touching the expenditure of public money or in support of any claim against the United States, he shall upon conviction thereof, suffer as for wilful and corrupt perjury."

It is to be noticed that the crime denounced here is not perjury. The Court says, page 254:

> "That act (referring to the one under consideration) does not create or punish the crime of perjury technically considered, but it creates a new and substantive offense of false swearing and punishes it in the same manner as perjury."

It appeared that the Secretary of the Treasury had for a long time required affidavits in matters of this kind and it is said by the Court, page 256:

> "Congress must be presumed to have legislated under this known state of the laws and usage of the Treasury Department. The very circumstance that the Treasury Department had, for a long period, required solemn verifications of claims against the United States, under oath, as an

appropriate means to secure the government against frauds, without objection; is decisive to show that it was not deemed an usurpation of authority.

"The language of the Act of 1823 should, then, be construed with reference to this usage. The false swearing and false affirmation referred to in the act ought to be construed to include all cases of swearing and affirmation required by the practice of the department in regard to the expenditure of public money, or in support of any claims against the United States."

The Court further says:

"The language of the act is sufficiently broad to include all such cases."

And again it is said:

"There is nothing new in this doctrine. It is clear by the common law that the taking of a false oath with a view to cheat the government, or defeat the administration of public justice, though not taken within the realm, or wholly dependent upon the usage and practice, is punishable as a misdemeanor."

The case of O'Mealy vs. Newell (8 East. Rep. 364) affords an illustration of this doctrine.

Not to quote literally from the case last cited, it is sufficient to say that it was there held to be a misdemeanor at common law and punishable as such, if a person made or knowingly used a false affidavit of debt, sworn to before a foreign magistrate, in a foreign country, for the purpose of holding a party to bail in England; although such affidavit was not authorized by any statute, but was solely dependent upon the practice and usage of the courts of England. The substance of the court's holding in the Bailey case is that what was before a common law offense was now made a statutory offense.

Or, in other words, whenever an affidavit was admitted in evidence by the Treasury Department, if the affiant swore falsely in support of a claim against the United States he was guilty of an offense denounced by the statute.

It is said on page 253:

> "It is admitted there is no statute of the United States which expressly authorizes any justice of the peace of a state, or indeed any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States under the act of 1832. And the question is whether, under these circumstances, the oath actually administered in this case was an oath upon which there would be a false swearing, within the true intent and meaning of the Act of 1823." (See ch. 165.)

It is to be observed that the question was whether this was a case of false swearing within the meaning of the act providing that if a person should swear falsely in the matter refered to he was guilty of an offense. The act did not provide that a person should be guilty if he should swear falsely before any competent officer or tribunal in a case in which a law of the United States authorizes the administration of an oath, as is provided in Section 5392. It is submitted that the statute of 1823 sufficiently described the offense of false swearing and affixed a penalty, and the regulation of the department had nothing to do with the creation of the offense; but the custom of the department in receiving evidence of this kind under oath was approved by this legislation and the legislation made with reference to it. So that if a person should swear falsely to an affidavit of this sort in a foreign country, or should make an affidavit of any kind which would be received in evidence by the Secretary of the Treasury, and swear falsely, he would be guilty under this act. A careful reading of the case of the United States against Bailey will con-

vince any one that it is not authority for the defendant in error in this case.

Note the wording of the opinion on page 248:

"In prosecuting Bailey, therefore, for false swearing, in support of a claim against the government, nothing was done which the common law would not sanction. But as it is not contended that the Circuit Court derives from the common law any power to punish offenses; it remains to show that the indictment and the case shown in the certificate, fall within the statute upon which the prosecution was based. In doing this, it will appear that the Act of 1823 creates no new offense. It only prescribes a punishment for, and gives the courts of the Union jurisdiction to try an offense before known to the common law. It simply converts a common-law misdemeanor into the special statutory offense of 'false swearing.' As a statutory offense only, it is a new one. In a prosecution founded upon the Act of 1823, it is not necessary to show the requisites of technical perjury. It is necessary merely that the case be brought within the words of the statute. This is all that is ever required upon indictments concluding against the form of a statute.

"The words of the act are that 'if any person shall swear falsely in support of a claim against the United States, he shall suffer,' etc. It does not say how, or before whom, the false oath punished by it shall be taken. Why was the act made thus general? The answer is that the law-makers were aware of the practice of the government in every department to receive oaths before state officers in support of claims. The inconvenience of abolishing this practice, and requiring claimants to go in all cases before Federal judges, was obvious. Congress, therefore, left the practice undisturbed, as it had always existed; but affixed to falsehood in these oaths the punishment of perjury. Indeed, considering the uniform practice of the departments and of Congress itself to receive these oaths as evidence, and the presumption that it must have been in the minds of the legislators, at the time of the adoption of the Act of 1823, the conclusion cannot well be resisted that the generality of the language of that act was of purpose to embrace oaths such as this."

Further on, on page 249, it is said:

> "Without any particular inquiry as to the jurisdiction, does not the Act of 1823 extend to every case in which a false oath is actually taken in support of a claim? Doe s it not embrace every case in which the oath is by the admitted practice of the department received as evidence in support of claim? It is contended that it does."

The Bailey case when carefully considered does not support the contention of the defendant in error, but does inferentially and by analogy support the contention of the plaintiffs in error. It may be suggested that there was no necessity for the act under which the indictment was framed in the Bailey case if the false swearing would have been perjury under Section 5392 of the Revised Statute, and it was passed to cover cases not covered by the perjury act.

See Section 1029, Bishop's New Criminal Law, Volume 2, to the effect that certain false affirmations on oath were punishable as misdemeanors while not amounting to the offense of perjury.

The case of Caha vs. United States, above cited, has furnished counsel for defendant in error with a phrase with which possibly they may have deceived themselves, and it is this:

> "All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of Section 5392."

Caha was indicted for perjury in a homestead contest, and the question that he raised was this: did the local land officers, in hearing and deciding upon the contest with respect to the

homestead entry, constitute a competent tribunal, and was such contest so pending before them a case in which the laws of the United States authorize an oath to be administered? It appears from the opinion that the law expressly provides for a contest in pre-emption entries, but does not provide expressly for a contest in a homestead case. The Court says in its opinion, page 218:

> "We have, therefore, a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land; a specific act of Congress authorizing contests before the local land offices in cases of pre-emption; rules and regulations prescribed by the Land Department for contests in all cases of the disposition of public lands, including both pre-emption and homestead entries; *and the frequent recognition by acts of Congress of such contests in respect to homestead entries.* Clearly, then, within the scope of Section 5392, the local land officers, in hearing and deciding upon a contest with respect to a homestead entry, constituted a competent tribunal, and the contest so pending before them was a case in which the *laws of the United States* authorized an oath to be administered."

A subsequent frequent recognition by acts of Congress of homestead contests confers just as much authority upon the officers to hear and determine the contest, and to administer oaths and make such contest a case in which a law of the United States authorizes an oath to be administered, as though Congress in advance had enacted everything contained in the rules and regulations providing for the contest.

Judge Brewer in delivering this opinion says, at page 219, referring to the Bailey case, that Bailey's conviction of perjury was sustained; and again on the same page he says it was contended that, therefore, perjury could not be laid in respect to a false affidavit, etc.

Bailey was not charged with perjury, nor convicted of perjury, as quotations from the opinion in that case found in different parts of our brief amply prove. He was indicted for false swearing, which was punishable under the statute the same as perjury, the statute under which he was indicted defining and covering his offense.

The same judge, in deciding the case of United States vs. Curtis, 107 U. S. 671, 27 L. Ed. 534, says: referring to the Baily case

> "That was an indictment for false swearing. It was based upon an act of Congress which provides that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he should, upon conviction, suffer as for willful, corrupt perjury."

Mr. Justice Brewer in deciding the last case certainly understood that Bailey was not indicted for perjury.

The Court further says, page 219:

> "This perjury (referring to the one in the Caha case) was not merely a wrong against that tribunal, or a violation of its rules and regulations; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the statute."

The fact that Congress had frequently recognized these contests by various acts constituted the land officers a proper tribunal and the contest a case in which the laws of the United States authorize the administration of an oath, and consequently the regulations having been adopted as laws of the United States furnished the opportunity for a person to commit perjury within the meaning of Section 5392.

The frequent recognition by act of Congress of the rules providing for homestead contests before the Land Office officials

made homestead contests a case in which laws of the United States authorized the administration of an oath.

And, further, the homesteader, in order to prevail in a contest, had to substantiate only such matters and things as the law required proof of in order to entitle him to a patent.

While in the case on trial proof was required of matters not required by statute to be proved at all, and there has been no recognition of the regulations in question by any act of Congress.

A compliance with a regulation of the Land Department, it being a regulation not recognized by Congress, cannot furnish an occasion and opportunity wherein one may violate Section 5392 by taking a willful false oath in a case where a *law of the United States* authorizes an oath; only a law of the United States authorizing an oath can furnish such an opportunity and occasion.

The Caha case is founded upon correct principles, and the decisions would have been otherwise if contests in homestead entries had not been recognized by acts of Congress.

Counsel for defendant cites one case, namely, that of Ralph vs. United States, Fed. Rep., Vol. 9, p. 693, saying that it is an instructive case.

It may be instructive, but not as indicating what the law is.

The judge in that case seems to hold that a head of a department may make a rule prescribing that certain matters shall be proved not required by law, and direct before whom the oath shall be taken, and that a person swearing falsely concerning matter would be guilty of perjury. As is said in United States vs. Manion, Vol. 44, Fed. Rep., p. 801:

"Perjury can only be assigned upon an oath authorized by a law of the United States. Law, according to the most familiar definition of that term, is a rule prescribed by the supreme power of the United States. Now, the Commissioner of the General Land Office is not the supreme power of the United States. He does not create the laws of the United States, and he cannot be endowed with power to do so while the present constitution is upheld. He may exact from all who transact business in his bureau and in the district land offices compliance with the rules and regulations which he is authorized to make, but he cannot prescribe a rule which can have the force of a law of the United States, and the violation of which can be punished as a felony."
See the case above cited for an exposition of Judge Hanford's opinion.

Counsel also cited as an instructive case United States against Hearing, Fed. Rep., Vol. 26, p. 744. In this case Judge Deady held that:

"An applicant for the entry of land, under the homestead act, may make oath to the excusatory facts that authorize him to verify the affidavit accompanying his application, before the clerk of the county, as provided in Section 2294, Revised Statutes; and if such oath is willfully and knowingly false in any particular, the applicant is guilty of perjury."

The objection was made that this was not a case in which a law of the United States authorizes an oath to be administered. On page 748, Judge Deady says:

"On the whole, my conclusion is the Act of 1864, permitting an applicant to make his affidavit for a homestead entry in a certain contingency before a clerk by a necessary implication, requires such applicant, before he can avail himself of such privilege, to show by oath that such contingency exists; and that the clerk may, as incidental to his power to take an affidavit, administer such oath."

The judge held, therefore, that by necessary implication a law of the United States required the matter alleged to be false

in the indictment to be sworn to, and that the law gave the clerk who administered the oatth authority to administer it. Hence, Judge Deady's final conclusions are correct, if the law provided that the matter should be sworn to and authorized the person administering the oath to administer it. The criticism that we make of the case is this: that the judge seems to think that whether this was so or not, that a regulation of the department might take the place of the law. He was unable to find any regulation of the kind indicated, and the opinion is a very unsatisfactory one.

The case is probably cited by defendant in error on account of the reference Judge Deady makes to the Bailey case. The judge quotes the Bailey case to this effect, page 747:

> "In United States vs. Bailey, 9 Peters 238, it was held that the Act of March 1st, 1823 (3 St. 771), declaring 'that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he shall be guilty of perjury,' included, in the language of the syllabus, 'an affidavit taken before a state magistrate, authorized to administer oaths, in pursuance of the regulation or in conformity with a usage of the Treasury Department, under which the affidavit would be admissible evidence at the department in support of a claim against the United States, and perjury may be assigned thereon.'"

No such statement can be found in the Bailey case.

How any person could read the Bailey case, misunderstand it, and misquote in this way, we fail to see. The case expressly holds that no attempt is made to assign perjury, but to convict of the statutory offense of false swearing. Note the language of the syllabus, first paragraph:

> "Indictment for false swearing under the third section of the Act of Congress of March 3rd, 1823, which declares

that 'any person who shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, shall suffer as for willful and corrupt perjury.'"

The statute uses the word perjury to indicate the punishment that shall be meted out for false swearing, but does not say that the person shall be guilty of perjury who swears falsely. Further on in the syllabus it is said:

"*The act of* 1823 *does not create or punish the crime of perjury, technically considered.* But it creates a new and substantial (substantive) offense of false swearing and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case in which the state magistrate under the state laws had jurisdiction so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate and was not in violation of his official duty."

Again, to follow the language of the syllabus, it is said:

"The language of the Act of 1823 should be construed with reference to the usages of the Treasury Department. The false swearing and false affirmation referred to in the act ought to be construed to include all cases of swearing and affirmation required by the practice of the department in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to include all such cases, and there is no reason for excepting them from the words, as they are within the policy of the act and the mischief to be remedied. The act does no more than to change a common-law offense into a statute offense."

As we have seen, it was a common-law offense to support a claim against the government by false swearing, even though the oath was administered beyond the seas, and even though the one so falsely swearing did not commit perjury.

In perjury cases there are two questions. Is the case in

which the perjury is alleged to have been committed a case in which a law of the United States authorizes the administration of a oath; and, second, was the oath administered before a competent officer or tribunal? The statute itself does not prescribe how the competency of the officer or tribunal is to be determined. That is, it does not say whether his competency must be based upon a law of the United States or upon something else; but in deciding the other question it is absolutely essential to know whether the case in which the alleged perjury was committed is a case in which a law of the United States authorizes the administration of the oath.

We do not have access to the case of Prather vs. United States, Appeal Cases, District of Columbia, 82, cited by defendant in error on page 69 of his brief, but we understand that it is governed by the rules announced *In Re Kollock, supra.* If so, the law describes the offense and provides a penalty.

The case of Ralph against United States has not been followed by subsequent decisions, nor do we think the reasoning of Judge Deady has been. No authority is cited in the opinion in support of the Ralph case, and Judge Deady in citing one authority in support of his opinion, perhaps the authority from which he derived his opinion, shows he totally misunderstood the authority cited.

We again call the Court's attention to the case of United States against Bedgood, 49 Fed. 54. Defendant in this case was charged with perjury in final proof in her pre-emption entry. The proof was made agreeably to regulations promulgated by the Secretary of the Interior. Commencing at the bottom of page 58, the judge deciding the case says:

"Congress having expressly declared what officers are authorized to take the affidavits and administer the oaths required by law in pre-emption entries, and having expressly prescribed what statements or affidavit of the pre-emptionist shall contain, neither the Commissioner nor the Secretary has the legal authority to designate other officers before whom such oaths may be taken, or to prescribe oaths to the existence of other facts than those required by statute. The law makes the existence of certain facts and oath thereof the only prerequisite to demanding a particular right, and oath of other facts in connection therewith, however false, is not perjury."

In the case on trial the law made the proof of certain facts prerequisite to demanding a particular right. The Commissioner of the General Land Office prescribed that other facts must be proved as prerequisites to demandingthat right, and under the authorities no one could be convicted of swearing faalsely to the other facts so prescribed by the Commissioner of the General and Office.

On page 58 the judge rendering the opinion states the contention being made by counsel for the United States in the following language:

"But it is contended by the United States Attorney that, if said Act of 1857 is repealed, the Commissioner of the General Land Office has authority to designate by regulations before or by what officers such an oath may be taken, and, I understand, contends that the Commissioner is authorized to designate the character of the oath and the matters to be sworn to. Under the authorities already cited we have seen that perjury cannot be assigned on any such oath."

We call the Court's attention to the cases cited in support of this opinion and to the holding of the judge on page 56 that the indictment was uncertain.

We cite United States against Howard, 37 Fed., p. 666. This

was an indictment under Section 5392, and the defendant was charged with swearing falsely in attempt to commute his homestead entry. The Court says on page 668:

> "The matter on which perjury is assigned grew out of an affidavit made by the defendant on his application for a commutation of his homestead entry under Section 2301, Revised Statutes. The statements sworn to, and which are alleged to be false in the indictment, are not the statements required or authorized by law to be made in the affidavit of an applicant for a pre-emption homestead or homestead commutation entry.
>
> "Perjury cannot be predicated upon them, however false they may be."

We think it is safe to concur in the opinion of Judge Hanford, as stated in United States vs. Manion, to the effect that law is a rule prescribed by the supreme power in a nation; that the Commissioner of the General Land Office is not the supreme power of the United States, and that, while he may exact from all who transact business before him and in the district land offices compliance with the rules and regulations which he is authorized to make, he cannot prescribe a rule which can have the force of a law of the United States, so that one, failing to do the things by it commanded, or doing the things by it prescribed, is guilty of a crime.

At least four of the District Judges for the Ninth Circuit have made decisions of such a nature that it is certain they would uphold our contention to the effect that it is not perjury to take a wilful false oath concerning matters which are required to be proved at the time of final proof of a timber claim only by a regulation of the department. Each of these judges is qualified under the law to sit in this Court, and we submit their opinions are entitled to serious consideration.

We now pass to the discussion of the question of whether or not the regulation providing for the proof of matters other than those provided for by statute at the time of final proof is one that it was proper for the Commissioner of the General Land Office to make.

It will be observed that many of the cases cited by us concede that the regulation, the subject of discussion in such cases, was one proper to be made, and yet that such regulations, although reasonable, and within the authority of the head of a department to make, were not laws of the United States within the meaning of that phrase as used in criminal statutes.

We further insist that the regulation now the subject of discussion is not only not a law of the United States, but that it is not one the Commissioner of the General Land Office had a right to make for any purpose.

A head of a department cannot by regulation add to the statute.

See Morrill vs. Jones, 106 U. S. 466, 27 L. Ed. 267.

We insist that the case of Adams vs. Church, 193 U. S. 510, is conclusive and controlling that a timber land applicant has a perfect right to contract for the sale of the land *when he gets a patent*, at any time after the filing of his original sworn statement or application required by law, and therefore the attempt of the Land Department to require him to swear at the time *of his final proof* that he had not sold the land or contracted it away *between the time of the application and the final proof* was not a "*regulation for the carrying out of the law*," but was inconsistent with the law, and an attempt to usurp the functions

of the legislature and the judiciary, and to add something to the law, which Congress had never intended to, and did not intend to require.

Up to the time of Adams vs. Church, it must be remembered, there had been no occasion for the highest court to pass directly upon the question as to whether a party had a right to contract for the sale of the land before final certificate, either under the *timber culture*, or timber and stone legislation. Previous to this decision, there had been an occasional dictum of the courts in relation to the matter which might be construed one way or another, according to the inclination of the parties, but this was the first time that either of the laws had been *authoritatively passed upon*, and in that decision the Court held that as to the *timber culture* act, it was perfectly lawful for the claimant to contract away his land at any time after the original affidavit was filed placing it upon the ground that,

> "*Had Congress intended a different result to follow from the alienation in good faith, it would have so declared in the law.* To sustain the contentions of defendant in error would be to incorporate by judicial decision positively against the alienation of an interest in land not found in the statute or required by the policy of the law upon the subject,"

And distinguishing the timber culture from the homestead proof on the ground that the law requires in the homestead case an affidavit, at the time of the final proof, "that no part of such land had been alienated except as provided, etc.," and that no such requirement was involved in the timber culture act.

So that unless the two laws can be successfully distinguished, the Adams-Church case is entirely conclusive upon this point.

Can they be distinguished? A labored but ingenious attempt to make such a distinction is presented in the brief of the learned attorneys for the government, but we must submit that there is absolutely no distinction between the two acts in this respect. Each of the laws requires the person applying for the land, at the time of his application to make an affidavit that he makes the application "in good faith, and not for the purpose of speculation, or directly or indirectly for the uses or benefit of any person or persons whomsoever," and in the *timber culture* act that "*they intend to hold* and cultivate the land, and to fully comply with the provisions of said act," and neither of the acts require any *affidavit of non-alienation, express or implied, at the time of final proof.* The only requirements of the timber culture act at the time of final proof being that the applicant shall

> "Prove by two credible witnesses that he, or she, or they, have planted for not less than eight years, have cultivated and protected such trees as aforesaid."

And the timber and stone act requiring only that the applicant shall furnish to the Register of the Land Office satisfactory evidence

> "That satisfactory notice of the application presented to the Register as aforesaid was duly published in a newspaper as herein required. Secondly, that the land is of the character contemplated in this act, unoccupied and without improvements other than those excepted, either mining or agriculture, and that it apparently contains no valuable deposits of coal, silver cinnabar or coal."

This is the complete requirement of the law at the time of making final proof. There is no non-alienation clause whatever, and no affidavit required that the party has not contracted the land away since the making of his application.

Apply to this the language of the Supreme Court in the Adams-Church case:

> "The policy of the government *to require such an affidavit* when it intends to make it a condition precedent to the granting of title was indicated in the homestead act, and could readily have been pursued by a similar provision in the timber culture act if it was intended to extend the principle to that statute. The final proof under the latter act has in view sworn testimony that the number of trees required has been planted, etc."

And again:

> *"Had Congress intended such a result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law."*

When we remember that there is no requirement for any proof of non-alienation whatever at the time of final proof in the one case or in the other, nor any showing required at that time that the party still desired the land for his own exclusive use and benefit, is it not clear that there can absolutely be no distinction between the two?

It is contended that there is something distinctive in this regard in the policies of the act, but we submit that this is not the case.

There is, indeed, far more, tending to show a disposition on the part of Congress to limit the power of the applicant to deal with the land before final proof, and far more of a disposition to make the *gift a personal one* in the *timber culture* act than in the timber and stone act.

In the timber and stone act there is *nothing whatever* to show that Congress desired to limit the power of the claimant in transferring his right *after the original application;* and, indeed, as we shall presently see, there would be but little reason for such limitation.

In the timber culture act, on the contrary, there are many provisions which might be construed as suggesting an intention to make such a limitation.

In both cases the law provides that no person shall make more than one entry of one-quarter section under the act. (See Section 1 of timber culture act. Section 1, timber and stone act.)

So that in this respect the acts are exactly on a parity, the right of acquirement being limited in each case in exactly the same way.

But the timber culture act requires "*the party making an entry* to break five acres the first year and five acres the second year, etc.;" and it also contains a provision "that *no final certificate shall be given*, or patent issued, for the land so entered until the expiration of eight years from the date of such entry, etc." Again, Section 3 of that act provides "that if at any time after the filing of such affidavit, and prior to issue of patent, for said land, the *claimant* shall fail to comply with any of the provisions of this act, then in that event *such land shall be subject to entry under the homestead laws*, etc.;" and Section 4 pro-

vides "that no land acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor."

Now, it is submitted that these provisions are strongly suggestive that it was the intention of Congress to keep a *timber culture* claim in the hands of the original applicant up to the time of issuing the final certificate, which could only be at the end of the eight years.

And the fact that the Supreme Court refused to so construe it, or to limit the power of the applicant to contract away his right in the face of these strong provisions, shows how reluctant that high court is to create any limitation by judicial construction, or to apply such supposed limitation, a single day *beyond the time actually fixed by Congress;* and it also shows how plainly and clearly *Congress must express its intention* before the courts will give effect to such a limitation.

There are no such limiting provisions *after the filing of the original application* in the timber and stone act; no provision for any non-alienation clause at the time of final proof. Nothing whatever to limit the right of a claimant or to show that it was the intention of Congress that his right to deal with the land, in so far as his claim went, was limited in any manner or made personal to him at any time after his first filing.

In this act, as in the timber culture act, Congress saw fit to provide explicitly just what the claimant *should* prove at the time of his final proof, and there is not a word *about non-alienation whatever*—nothing expressed, and absolutely nothing from

which any such intention could be implied; and if it is put there, it must be put there, we submit, by judicial legislation absolutely independent of any act of Congress.

There is much said in the brief of the learned attorneys for the defendant in error about the use of the word "entry" and the word "purchase," and an able argument is made to show that it was the intention of Congress that the land should be *sold* to the original claimant, and that he does not get a vested interest and is not entitled to a patent until he has made his final proof.

But we submit that all this is immaterial; it is ingenious, mayhap, but nothing more.

We do not contend that the sale to the claimant was completed until he had made final proof and paid his money. Neither do we contend that the government was bound to, or even could under the law, permit some other person than the claimant to complete the purchase of the original applicant and take patent directly to himself for the land. It is not necessary for our case to so contend. Neither could the purchaser from the original claimant get the patent in that way under the *timber culture* law, construed by the Supreme Court in the 193 U. S., because in both cases *the sale must be made and the patent issued to the original applicant.* This is perfectly clear as to the timber culture law from the very terms of that law, which we have already quoted, and which requires the patent to be issued to the claimant; and yet the Court says in the Adams case, "that there was nothing inconsistent with the law, because he had 'agreed to convey an interest *to be conveyed' after patent issued.*"

In both cases it is perfectly clear that the claimant must *himself* comply with the law, and that the final receipt and patent must be issued *to him*. It cannot in any case be issued to anyone else. The question is not whether the government can be compelled to patent the land to someone else than the purchaser, but whether there is anything *unlawful* in the making *a contract to convey* after the applicant does get patent, and at what time it becomes lawful for him to do so.

It is idle to discuss the question of when, under either act, an applicant gets a vested interest in the land, as that is obviously collateral to the real question. There can be no question but what each party gets some kind of an interest from the time of his original application. It is absurd to suppose that the government would permit, or that it could *justly* permit, some other person to file on the land after the timber applicant (if his filing was valid) had filed upon the land and paid the filing fees to the land officials and proceeded to the expenses of publishing the notice, etc., even before final proof. In either case, if he fails to comply with th law he loses the land and it becomes at once subject to other claims. (This is by the express provisions of the timber culture act.) *In neither case is the final receipt to be given until the conditions on the part of the applicant have been entirely complied with.*

Even if Congress can take the land away from a valid applicant under either act, that will not affect the question. Of course, in such an event the purchaser before final certificate would get nothing by his purchase. And, of course, in either event if the claimant *did not comply with the law* the purchaser would get nothing. But that would not make the transaction *unlawful*, any more than any purchase between private individ

uals would be unlawful, because the title to the article purchased was contingent and might ultimately fail.

But it is said that the provisions of the timber culture act are "intended to benefit the government and the public generally as much as the applicant," and there is an attempt to show that this is not true of a purchase under the timber and stone act. But we submit that this distinction is absolutely without foundation. Who can say that the government, or the public through the government, is less benefited by the receipt of the $400 in cash than it is by the growing of forty acres of timber on a man's own private land?

Indeed, in the latter case the benefit to the government or to the public is very remote. The land upon which the timber grows is absolutely that of the claimant; the government has no interest whatever in the timber. The government cannot take from it even so much as a match or a toothpick, and unless it happens to be along some public road the traveler or any member of the public has no right to even lay his head in the shadow of a tree. The only benefit to the government or public is the remote and perhaps fanciful one of beautifying and developing the country. Who can say, at any rate, that this is, or has been, of more benefit to the public or to the government than the vast sums received from the sale of timber lands at the rate of $400 for each quarter section?

Besides the buying of this timber land and the ultimate conversion of its products into lumber, and ultimately into fences, barns and homes, in city and country, is, itself, a development of the country. At any rate, as great as any that has been re-

ceived or could be expected from the growth of isolated groves upon prairie lands.

It is said that the price of $2.50 per acre is but a small part of the value of timber lands. Even if it were, it would not be material upon the question involved. But it was not a "small part" of the value of these timber lands *at the time the timber land act was passed.*

On the contrary, it was probably the *full value* at that time, in nearly all localities, and for years and years and years the timber remained untouched at that price per acre, until the subsequent development of the country, the building of railroads, etc., brought the different sections of the country closer together and multiplied the value of these lands. The act should be construed with reference to the conditions at the time it passed, and not with reference to present values.

It is said that "it is inconceivable that Congress intended to permit a person to sell his privilege to purchase before he had acquired any vested interest in the land." We are not contending that he had a right to *sell his privilege.* He probably could not do that, as we have seen, under the timber culture act, or under the timber and stone act, because in both acts the final certificate and patent must run to him; but it is not "inconceivable" that Congress should intend, under either act, to leave him to contract as he pleased in relation to the *subsequent* disposal of the land. The purchaser in both cases, of course, taking his chances of the title being perfected according to law.

Why is this particular sixty days between the original filing and the final proof to be deemed so inconceivably precious and important? Why is it entirely "conceivable" that Congress intended that he should have full power to dispose of the land if he saw fit *the moment that he made final proof,* and inconceivable that it so intended after he had *filed?* And why is that sixty days any more important than any other period of time as a supposed check upon fraud? If Congress wanted to limit the disposal of the property and keep it in the hands of the first purchaser, why should it not make a five-year limit, as in the homestead law, or a one-year limit, or a six-months' limit? And why did it not have a right to make the limit *wherever it saw fit?*

It did have that right, and one limit will be as reasonable as the other. Congress, we submit, had the perfect right to fix the time up to which a party must not contract for the subsequent sale of his right. The limit was perfectly arbitrary, and one was as reasonable as another; or at least different minds might differ as to which was the more reasonable. *And Congress did fix that time by requiring an affidavit to that effect at the time of the original application, and at no other time.*

It was evidently not the intention of Congress, as construed by the Supreme Court, to hold these timber lands indefinitely in first hands. Indeed, such a provision would have entirely defeated the purpose of the act, which was, no doubt, the development of the country, because no one man, with a single 160 acres of land, could construct sawmills, build roads and make the products of the timber available. Therefore, the govern-

ment, while giving the individual the benefit of the purchase in the first instance, would not see fit to limit very closely the right of the claimant to contract in relation to the land, but would limit it only so that the *original filing* must be in the applicant's own behalf. When the filing had once been made in good faith by the original applicant, with the intention of getting the profit to himself, it made little difference to the government whether he contracted the land to a purchaser *at once, or sixty days afterwards*, provided he complied with the law and paid the government for the land.

It must be remembered in construing this law that it passed Congress at a time when there was no other way for corporations or individuals, engaged in the manufacture of lumber, to obtain timber from the government, except from the repurchase of timber land claims taken under this law.

There was then no "reserve" system, and no provision for the sale of government timber.

It must then have been the expectation, and it was probably the intention, of Congress that many of these claims would pass speedily into the hands of companies engaged in the sawmilling business. Otherwise, the country could not be developed, or towns, villages and cities built.

We submit, then, that there is absolutely no principle of public policy—nothing in the general policy of the laws, and certainly nothing in the language of the acts themselves—upon which any distinction can be made between the "Timber and

Stone Act" and the "Timber Culture Act," as construed in Adams vs. Church, and that case, with the principles announced therein and the reasoning stated for the decision, is absolutely conclusive that the limit upon a man's authority to contract in relation to his timber claim, as he would in relation to other property, does not extend beyond the time when the non-alienation affidavit, required by Congress, is to be made and filed, and that after that he has a perfect right to contract in relation to the land as he sees fit, subject, of course, to the qualification which exists in both of these acts: that if he does not comply with the law and obtain title from the government, the party to whom he contracted gets nothing.

There is nothing whatever in the provision that the land shall not be sold to any one person or association of persons in quantities exceeding 160 acres. Exactly the same intention is clearly expressed in the timber culture law, construed in Adams vs. Church. In both cases the *sale* was limited to 160 acres to each person. In neither case could that sale be said to be complete until the purchase price, in money or services, had been paid and the patent issued. And in both cases, as we have seen, the patent must ultimately issue to the claimant to whom alone the land is sold by the government. But it does not follow in either case that because the land can only be "sold" to individuals, that, therefore, the individual cannot contract in relation to the subsequent disposal of it until the sale is complete. In both cases it clearly requires something else than the mere limitation upon the amount to be purchased by one individual to narrow his right to contract in relation to the disposal of that one purchase.

This limitation is expressed in the homestead act by the affi-

davit of non-alienation at the time of *final proof*, and it is expressed in the timber and stone act, and in the timber culture act, by requiring a like affidavit *at the time of the original filing*.

It is said, in the brief of defendant in error, that

> "The law contemplates, however, that every person *who has sufficient means with which to purchase* 160 *acres of timber land, * * * * or who is able to borrow money with which to make such purchase*, will be able to retain the ownership thereof until he has been offered and received at least the then market price of that land, etc."

If this means anything, it means that the law was intended not for the poorer classes who need the bounty of the government most, but only for those with credit or means. But we see no reason for such distinction or construction, and no reason to suppose that Congress did not intend that any person, however poor, who might find a desirable piece of timber land lying open, might not file upon the same for his own benefit, as required by law, and afterwards be permitted to make any arrangement he could compass by which he could get the necessary funds to make his final proof. And we see no reason to suppose that Congress, while intending to allow free disposal of land, when once taken, should put the limit of that free disposal, at such a time, as would allow the man of means to complete the purchase and immediately do with the land as he saw fit, and at the same time to put the limit so far back that his equally honest neighbor, who wanted the land for the same purpose, but was unfortunate enough to have no means or credit at all, could not have the benefit of any timber purchase whatever.

We think it more consonant with the spirit which our gov-

ernment has always manifested to suppose that the law was intended for the special benefit of the very poor, at least as much as for any other class; and probably this was the reason why Congress placed the limit *at the filing*, and not at the final proof, and after the money had actually been paid. So that even a very poor man, if he actually wanted to file upon the land for his own benefit, might have a free hand in arranging about the disposal of it after he had filed, so as to get the money with which to complete his purchase, and thereby derive his share of the benefitts from the bounty of the government, which he could not for lack of means otherwise possibly derive.

Much is claimed in the brief of the learned attorneys for the government from the case of Budd vs. United States; and there are some intimations in that opinion which, were it not for the subsequent case of Adams vs. Church, might seem to support their contentions.

But it must be remembered that this question was in no way presented or involved i nthe Budd case, and there is no rule, perhaps, of more frequent application than the one which limits the effect of a decision of a court to matters *involved in the case under consideration.*

In the Budd case, then, *there was no question whatever as to the effect of an agreement made between the time of filing and the time of final proof.* In that case the land in question was conveyed *after final proof,* and there was no contention that there was a contract to convey between the time of filing and

the time of making final proof. Therefore, the effect of such an agreement was not before the Court. It was not presented, probably, by the argument of counsel, and it probably (since it was not involved in the case) received no careful attention at the hands of the Court. If the Court assumed, as is contended, that a party could not contract in relation to his claim after filing, and before final proof, it was not a deliberate decision of the Court upon that point, and presumably was not intended so to be, because, as we have seen, that question was in no way involved, and the Court was not required to give it any careful attention, because the question then being presented was, not whether a contract *before* final proof would make the claim unlawful, but whether a contract made *after* such final proof would have that effect.

And the Court finding that the contract there in question was *not* invalid, it became unnecessary to inquire as to what would have been the effect of a contract made between the date of filing and the date of final proof. We submit, therefore, that if there is any language in that opinion supporting the position of the government, in this case it must be held to be the mere expression of the individual views of the learned judge who wrote the opinion upon a question not involved, and, therefore, not based upon argument or a careful investigation.

If this were otherwise, the case could not have *escaped the attention of the Court* in the subsequent case of Adams vs. Church, which, as we have already shown, is entirely inconsistent with the construction of the Budd case now contended for by the learned attorney for the government, and which would

necessarily overrule the former case, if that was intended as a decision, upon the question here involved.

REPLY TO SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

GOVERNMENT'S CLAIM THAT ERRORS IN EVIDENCE SHOULD NOT BE CONSIDERED BECAUSE (as is alleged) THE PAGES OF THE RECORD ARE NOT REFERRED TO IN THE ORIGINAL BRIEF OF THE PLAINTIFFS IN ERROR.

To show how little foundation there is for this contention, it is only necessary to ask the Court to examine the copies of the briefs prepared for the use of the judges. It will be found that the pages of the record relied upon are carefully pointed out.

It is true that this was not done at the time these briefs were originally served and filed, as required by the rules, because this was a physical impossibility under the circumstances of the case.

At the time the case was set down for hearing the record had not been printed, and *it had not been printed* at the time when the limit of time allowed by the rules for plaintiffs in error to file their brief expired.

It was utterly impossible, therefore, for the plaintiffs in error to file their brief within the time fixed by the rules of the Court, and at the same time point out therein the pages of the printed record, because the record had not yet been printed and the pages were unknown.

It will also be remembered that, in view of these facts, the plaintiffs in error appeared before this Court at its term in Portland and asked for an extension of time in which to file their briefs, both because of the impossibility of complying technically with the rule, and also because they had not sufficient time to properly prepare their brief.

This application was resisted on the part of the District Attorney and denied by the Court.

One of the grounds urged by the District Attorney against this extension, as the Court will remember, was that the pages of the record could be left blank and the copies filed with the Court, could be filled in after the record was completed. This was actually done, and the copies of the brief in the hands of the Court will show the pages fully filled in, so that the Court will not be under the necessity of wading through the whole record, as suggested in the supplemental brief.

The only thing, therefore, that could be urged in this behalf by the government is that this paging was not done technically within the time *fixed by the rules of the Court;* and we submit to the Court that the learned attorneys for the government are not in a very graceful position to raise this question, in view of the fact that *their brief was not filed within the rules at all.*

In the first place, their brief was not filed within three days before the case was called for hearing, as required by the rules. Then, *after the time had expired,* they applied to the Court for twenty days' extension of time after the hearing. This was allowed, and then, afterwards, two other extensions were taken, extending the time until ————————; and even then no brief was filed within either of these orders, nor was any filed or served until about the 9th day of January, 1907, when a brief was filed purporting to be a complete brief, and not until about the 19th day of January was the last volume or supplemental brief filed and served.

We think, therefore, that in view of these facts, the attorneys for the government are not in a position to raise so narrow a technical question. The filling in of the pages referred to in the record was a physical impossibility at the time of the original filing of the briefs of the plaintiffs in error; and if we might be permitted to say it, it seems to us to show the desperate condition of the case of the attorneys for the government in their own estimation, when they are seeking to foreclose the plaintiffs from a hearing thereon, upon grounds so narrow in themselves and resting upon so slight a foundation.

EXCEPTIONS TO THE EVIDENCE FULLY SAVED.

Another attempt to prevent the Court from passing upon the question of whether or not the defendants in the Court below

were tried in accordance with the rules of law, upon purely technical grounds, is based upon the claim that their objections were not sufficiently formal.

In order to sustain this narrow position, the government passes over the *statements of the exceptions themselves*, which were intended to and did state the objections, ruling of the Court, and exception, as required by the rules of this Court and the practice at common law; and bases their objection upon what purports to be a mere detailed statement of the *testimony of the witness* in question, which does not purport to disclose the details of the rulings and exceptions.

The statement of each particular exception relied upon did not "creep" into the record. It was placed there openly and above board, and under such circumstances that there could be no mistake; and it was placed there *because it was the truth and the fact*, at a time when the whole matter was fresh in the recollection of the attorneys and the Court. The proposed Bill of Exceptions was fully presented to the attorneys for the government in Court below, as is shown by the record, and they were given every opportunity to correct any errors if there were any.

The statement of these objections and exceptions of the different witnesses are as follows:

Of the witness Feuerhelm:

"Q. Now, at the time you filed this paper—signed it—

what was your intention as to what you were going to do with the land when you got title to it?" *To which the defendants objected as incompetent and immaterial, and not in any way binding upon the defendants,* but the objection was overruled, *to which ruling the defendants excepted,* and the witness answered: "Well, I thought it should go to Gesner," and thereupon the final proof papers of said witness were offered and admitted in evidence over the objection of the defendants, as in similar cases hereinbefore referred to. Said witness was also asked by the government the following question: "What was your understanding when you left Gesner and when you filed on a claim as to whether you had promised that you would let him have it when you got the title?"

"A. Well, there was no real promising."

"Q. You didn't say that?"

"A. No, sir."

"Q. But what was your understanding as to what he believed, and what *do* you believe?" *To which the defendants objected as incompetent and immaterial, calling for a conclusion of the witness, and not binding upon the defendants;* but the objection was overruled, and *the defendants excepted and their exception was allowed,* and the witness answered: "I believed nothing else, but I went in to file on the claim." Thereafter the witness was asked the question: "At the time you filed, did you intend to let Dr. Gesner have the land when you got the title—at the time you were signing that paper—filing?" *To which the defendants objected as incompetent and immaterial, calling for a conclusion of the witness, and not binding upon the defendants;* but the objection was overruled, and the defendants excepted, whereupon the witness answered, "I guess I thought so."

See printed record, pages 515 and 516.

As to the witness Calavan, they were as follows:

Whereupon the witness was asked: "Q. What was your understanding at the time as to what the terms were upon which you were taking it up?" *To which the defendants and each of them separately objected as calling for a conclusion of the wit-*

ness and incompetent, and not binding upon said defendants in any way; but the objection was overruled by the Court, *to which ruling each defendant then and there excepted,* and the witness answered: "Why, I understood that I was to receive $500 for the same when patent issued." And thereafter the further question was asked of the said witness: "Q. And was it your intention at the time you were making that filing to convey it for the $500 as soon as you did get patent, or what was your intention in respect to it?" *To which each of the defendants then and there objected, upon the ground that it called for a conclusion of the witness and was incompetent, and not binding on said defendant* in any way; and thereupon the objection as to each defendant was overruled, *and each defendant then and there* excepted to the ruling, and the witness answered: "My intention was to convey it to them when I got patent."

See printed record, pages 351 and 352.

So the record as to the witness Crain:

"Q. What was your understanding as to whether you had promised to do that or not?" *To this defendants objected and the Court ruled that he might state his belief, to which ruling the defendants then and there excepted, and their exception was allowed,* and the question was then asked: "Well, what did you believe?" *To which the defendants objected as incompetent and immaterial, and not binding in any way upon the defendants;* but the objection was overruled, and the defendants excepted, and their exception was allowed, whereupon the witness answered: "Well, I would have felt that way if I had went ahead and proved up on the land, and they had furnished me the money to do it with." Whereupon the witness was asked the following question: "What was your understanding of it?" To which the defendants objected, being a leading question and calling for the understanding of the witness; but the objection was overruled, and the defendants excepted, and their exception was allowed, whereupon said witness answered: "Yes, sir."

See printed record, pages 388 and 389.

And as to the witness Hudson:

"Q. What was your intention as to what you would do with the land at the time you signed that?" *To which the defendants objected as incompetent and immaterial, and in no way binding upon the defendants;* but the objection was overruled, and *the defendants excepted, and their exception was allowed.*. Whereupon the witness answered: "A. Well, I was going to sell it, of course, if I could; I took it up for speculation." "Q. Sell it to whom?" "A. Well, I was going to sell it to the highest bidder. I was calculating to make a thousand dollars out of it." "Q. What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not?" Mr. Bennett—"We object to that, your honor." Objection overruled. Defendants except. "A. Well, now, I don't know; it was kind of an agreement—a verbal one, though."

This is the record in the case, signed and sealed by the Court, and it is as useless, as it is without foundation, for the defendant in error to attempt to claim that these prominent statements in the proper place in the very body of the Bill of Exceptions "crept" into the record, or got there by any subterfuge or by any underhand way.

And since the defendants in error have seen fit to set up the claim that the record is not correct, and to go outside thereof, it is proper, perhaps, for us to state the facts as to the real manner in which the Bill of Exceptions was prepared.

As originally presented, the Bill of Exceptions was comparatively short, the plaintiff in error seeking to limit the exorbitant expenses of making up the transcript and printing the record (in this case these expenses have amounted to about $2,500), and for this purpose the bill was presented in the manner which

has been so often approved by this Court, by simply stating the objection, ruling and exception, and enough of the preceeding facts so that the Court might understand how the question arose. The proposed Bill of Exceptions, therefore, contained nothing except the brief general statement and the preliminary matter, now appearing in the record as to each of these witnesses, and the portion of which, bearing upon the particular question, has just been quoted in each case.

It will be seen, therefore, that the manner of stating these objections and exceptions was very prominent, and constituted, indeed, almost the whole of the Bill of Exceptions as originally presented, and *everything there was in the proposed Bill of Exceptions in relation to the questions involved.* Being so often repeated and in so prominent a form, it could not possibly have escaped the observation of the learned attorneys for the government.

When the matter came up for hearing before the Court the proposed bill was objected to, not because these exceptions had not been taken as a matter of fact (which they had been in every instance), or because they were not properly stated, but because it was thought and urged that there was not *sufficient explanation of the way in which the questions arose.* And the Court intimated that where the objection and exception were taken to any part of the evidence of a witness, the whole of the evidence of that witness, both direct and cross-examination, should be inserted as throwing light upon the questions involved. And thereupon the plaintiffs in error was required to and did amend their

Bill of Exceptions by adding to the statement previously made the full *testimony* of such witness, and this was done as it now appears in the record.

In doing this a transcript, which had been prepared by a reporter, was followed for convenience in copying, and more or less of the rulings and exceptions and discussion back and forth were presented therewith. This transcript, however, does not purport to present in detail all of the discussions or rulings of the Court, and was not intended so to do, but simply *the evidence of the witness.*

As matter of fact, in order to expedite the trial, and sometimes at the suggestion of the counsel and sometimes at the suggestion of the Court, the objections and exceptions were not always repeated as to each particular question; but when a question of any kind first came up a full objection would be made, a ruling taken and exception allowed, and then an understanding was had with the Court that the same objection, ruling and exception should go to every similar question through the case, without repeating it *in extenso* each time, and that when the record was made up the objections and exceptions so taken should appear therein. In making out the transcript, the reporter (who, by the way, was not the official reporter, but one employed by defendants) sometimes transcribed these colloquies between the Court and counsel in full, sometimes partially, and sometimes not at all.

At the time the bill of exceptions was settled, the matter was fresh in the minds of the Court and counsel. The Court knew that these exceptions were all fully taken. Indeed, the Court was sometimes impatient because counsel for the defendants, fear-

ing that there might be some misunderstanding, and to avoid any possibility of it, would repeat objections, as the Court thought, unnecessarily.

We do not understand that there is any particular form of words in which objections or exceptions must be stated. It is enough if the Court understand that an objection was intended, and the grounds thereof, however that intention may be conveyed to the Court.

Thwing vs. Clifford, 136 Mass. 482.
Leyland vs. Pingree, 134 Mass. 370.

So, when an objection has been once fully made and brought to the understanding of the Court as to a certain class of testimony, it is not necessary to delay the trial and annoy the court by repeating the objection in all its details every time a similar question is asked. On the contrary, it is perfectly proper to have an understanding with the Court that the objection and exception, once taken, shall go to all similar testimony, and that the exception shall be formally extended in the bill when settled.

This has always been the practice, we think, in all the Courts, and it saves expense and delay in the trial of the case, and unseemly interruption and annoyance to both Court and counsel.

That these exceptions were taken in some form is conclusive

from the statements in the Bill of Exceptions, to which we have already referred.

The Court knew perfectly well that it was the intention of the defendants to object and except to all these rulings, and assented to the manner in which the objections were taken.

To have refused to state these exceptions upon the ground that they were not formally taken and renewed to each question, after giving counsel to understand that they might be taken in that way, would have been an injustice which could never be expected of any Court.

That it is perfectly proper to take exceptions in this way is sustained by an overwhelming line of authorities.

Graves vs. People, 18 Cal. 170, 32 Pac. 66.
Gilpin vs. Gilpin, 12 Col. 504, 21 Pac. 612.
Stevenson vs. Waltman, 81 Mich. 200, 45 N. W. 825.
Pfeil vs. Kemper, 3 Wis. 287.
Sharon vs. Sharon, 79 Cal. 633, 22 Pac. 26.
Wolf vs. Smith, 36 Iowa 454.
Dilliber vs. Home Life Insurance Co., 69 N. Y. 260.
Carlson vs. Walderson, 147 N. Y. 652.

In Leyland vs. Pingree, supra, Chief Justice Morton, delivering the opinion of the Court, says:

> "The form in which exceptions are saved is of no consequence. If expressly saved, of course they must be allowed.

It very often happens in trials that counsel and the judge understand that the purpose of the counsel is to save exceptions, although not alleged in express language. Whatever form may be used, if the counsel and the judge both understand that exceptions are saved, the judge may, and should, allow such exceptions under the rule."

And in Thwing vs. Clifford, supra, the same Court says:

"No particular form in alleging and saving exceptions is required. If the Court understands that counsel except to a ruling, or refusal to rule, a refusal of instructions, or instructions given to a jury, it is sufficient. Leyland vs. Pingree, 134 Mass. 367. The danger in not taking an exception expressly and formally is that the judge may not understand that counsel intends to except, and thus the exception be lost. *"In the present case, we must assume, from the fact that the judge allowed the exceptions, that he understood the counsel of the defendant excepted* to his refusaal to instruct the jury as requested, and to the instruction given."

Again in Delliber vs. Home Life Insurance Co., supra, it is said, Earl, Judge, delivering the opinion of the Supreme Court of New York:

"When upon a trial an objection has once been distinctly made and overruled, it need not be repeated to the same class of evidence. The rule in such cases has been laid down, and should be observed in the further progress of the trial, without further vexing the Court with useless objections and exceptions."

And in Graves vs. People, 18 Col. 170, cited above, the Court says:

"A constant repetition of the same objection would have unnecessarily delayed the trial, and might have prejudiced the defendant's cause before the jury. When a certain class of evidence is offered, such objection as counsel have to its admission should be fully stated. After this has been done, and the objection argued, overruled and the evidence received,

the attention of the Court again called to its objectionable character by a motion to strike out the evidence, and exceptions to the adverse rulings duly taken, as in this case, counsel may well desist from renewing fruitless objections."

We submit that the matter requires no further comment. That under the record it must be presumed (as it was in fact) to have been carefully examined and passed upon, both by the attorneys for the government and the Court, and that the objections and exceptions were fully taken in a careful and timely manner.

And this brings us to the merits of the question, as to WHETHER THE COURT ERRED IN PERMITTING THE GOVERNMENT TO PROVE THAT THERE WAS A CONTRACT BETWEEN GESNER AND THE DIFFERENT APPLICANTS, NOT BY PRESENTING THE FACTS AS TO WHAT WAS ACTUALLY SAID AND DONE, BUT BY PERMITTING THESE APPLICANTS TO STATE *WHAT THEIR UNDERSTANDING OF THE TRANSACTION*, AND THEIR *UNDISCLOSED INTENTIONS* IN RELATION TO THE DISPOSAL OF THE LAND, WAS.

At the outset it is proper to advert to the fact that there is no attempt in the brief of the defendant in error to distinguish the authorities cited on this point on pages 90, 91 and 92 of the original brief of the plaintiffs in error. It is impossible to distinguish them, or to successfully controvert their doctrines, that the *undisclosed intentions and understandings of a witness or party to a transaction are never admissible as against the other party.*

We quote again from the Ohio Court in Crowell vs. Bank, 3 Ohio St. 411:

"It appears that the plaintiff below was not content with the statements of the defendants tending to maintain the action; but after the witness had related the conversation of the parties, he was further interrogated, and required to state his *understanding* or *inference* from the conversation as to the *understanding* or *meaning* of the parties. * * * * But to allow a witness, after having narrated a conversation of one of the parties, to be interrogated (and that, too, by the party calling him, notwithstanding the objection from the other side), and to state his conclusion or understanding from the conversation as to the meaning or understanding of the parties holding the conversation, would be a *most dangerous relaxation of the rules of evidence*, unwarranted by any reported decision which has fallen under our observation."*

And from Hewitt vs. Clark, 91 Ill. 608:

"The safe mode of proving an agreement by parol is to require the witness to state what was said, if anything, by either of the parties in the presence of the other on the subject. If a witness cannot give the words of the party, he may undoubtedly be permitted to state the substance of what was said. *He ought not, however, to be allowed to substitute his inferences from what was said* or *his understanding*. To permit a witness to answer such a question, 'it is my understanding, etc.,' is erroneous."

And from In Re Weisenburg, 131 Fed. 524:

"The question as to whom credit was given and from whom payment was expected could be determined only from the facts of the transaction, i. e., what was said and done before and at the time the notes were executed and discounted. It would not be affected by any testimony of Driscoll as to what *his notions in regard to the matter were*."

And from Gentry vs. Singleton, 128 Fed. 680:

"The inference or understanding to be drawn from what occurred at that time is to be determined by the Court or jury, and *the unexpressed thought or understanding of the witness was wholly immaterial*."

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*The *italics* in quotations in this brief are ours, except where otherwise specified.

It is clear, then, that the defendants must have been greatly prejudiced and injured by this constant and frequent repetition as to their *"understanding as to what the transaction was"* and as to *"what was their undisclosed intentions."*

As we have said before, the line between a lawful and unlawful transaction in relation to timber lands, as the law is construed by the highest authority, is an obscure and difficult one, and it must be remembered that it was contended by the defendant, Gesner, who was the moving party so far as the defendants were concerned in all this matter, that he had taken legal advice and did not in any manner overstep the law.

The defendants did not deny that Williamson and Gesner were desirous of getting control of these lands. They did not deny that one of their objects was the desire to protect their range.. They did not deny that they had let it be known in some instances, how much they could afford to and would be willing to pay for the land. They did not deny that they had loaned the money to different claimants with this in view; *but what they did claim* was that they had carefully abstained from *making or attempting to make any contract with the party in relation thereto,* and in this they were corroborated, not only by their own witnesses, but by a great number of the witnesses for the government, many of whom testified that Gesner told them that neither he or they could make any contract in advance.

Now the Supreme Court of the United States—the highest controlling authority—had construed this timber law, just in that way—*That a party had a right to loan money to aid timber claim-*

ants in making their claim with the expectation of buying the land, and that he had a right to go into a community and let it be known what he was filling to pay for the lands, for the purpose of inducing them to be taken, *and that the claimant had a right to take the land with the expectation of selling it a profit to such person*, and that the thing which the law prohibited, *was the previous making of a contract*, and that as long as there was no attempt to do that, either expressed or implied, the transaction was lawful and that the taking of the claimant for such purpose would not be a taking for speculation within the meaning of the law.

We quote from the opinion in the Budd case, 144 U. S., 154.

"The particular charge is, that Budd, before his application, had unlawfully and fraudulently made an agreement with his co-defendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such co-defendant. Upon this question the fact that stands out prominently is, that there is no direct tesimony that Budd made any agreement with Montgomery, or even that they ever met, or either knew of the existence of the other, until after Budd had fully paid for the land. No witness ever knew or heard of any agreement. What, then, is the evidence upon which the government relies? It appears that Montgomery purchased quite a number of tracts of timber lands in that vicinity, some ten thousand acres, as claimed by one of the witnesses; that the title to twenty-one of these tracts was obtained from the government within a year, by various parties, but with the same two witnesses to the application in each case; that the purchases by Montgomery were made shortly after the payment to the government, *and in two instances a day or so before such payment;* that these various deeds recite only a nominal consideration of one dollar; that Budd and Montgomery were residents of the same city, Portland, Oregon; that one of the two witnesses to these applications was examining the lands in that vicinity and reporting to Montgomery; and that the patentee, Budd, years after his con-

veyance to Montgomery, stated to a government agent who was making inquiry into the transaction that he still held the land and had not sold it, but that it was "in soak." But surely this amounts to little or nothing. *It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them.* This was perfectly legitimate, and implies or suggests no wrong. The Act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. *All that it denounces is a prior agreement, the acting for another in the purchase.* If, when the title passes from the government no one save the purchaser has any claim upon it, *or any contract or agreement for it, the Act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government;* and any person knowing of that offer, might rightfully go to the land office and make application and purchase a timber tract from the government, and the facts above stated, point at naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumer to know the law. And in this respect the case does not rest upon presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acquisition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase."

So, also, in Olson vs. United States, 133 Federal 853, it was said by Munger, District Judge, expressing the opinion of the Court:

> "In the light of these decisions, as well as a sensible construction of the statute, we have no hesitancy in holding its true meaning to be that any citizen of the United States may purchase lands as therein provided, where such purchase is for his own exclusive use and benefit, *notwithstanding at the time of such purchase he may have in contemplation a future sale for a profit;* that what the statute denounces is that a party shall not, at the time of the purchase, have directly or indirectly made any agreement or contract in any way or

> manner with any person or persons by which the title he may acquire shall inure, in whole o rin part, to the benefit of any person except himself; that the application for the land must be made in good faith for his own exclusive use and benefit, and not as the agent or hireling of another to obtain the land for some one besides himself."

Here, then, it is obvious that the whole case of the government depended upon whether or not there was a contract, or, rather, upon whether or not the defendants *conspired to have a contract,* and *then have the applicants swear there was none.*

Assuming, then, the truth of the defendants' contention (corroborated as it was by nearly all the witnesses for the government), namely, that they desired to obtain this land if possible, that they were furnishing this money to the applicants with the expectation of buying it if they could, and that the applicants took the land, expecting to sell it to them, as they knew they wanted the land, and there were no other purchasers in the field at that particular time, but that defendant Gesner (who made all the arrangements) was carefully abstaining from making any contract, express or implied, being secured for the repayment of his money by the mortgages and notes of the applicant, and trusting to the improbability of there being other buyers, and the natural desire of the applicants to accommodate him on account of being a neighbor, and having furnished them the money with which to buy the land, and taking his chances on someone else coming in and bidding more than he could afford to pay, the transaction was, under this assumption, obviously entirely legitimate under the decision of the United States Supreme Court. There was no attempt to bind the parties to sell, either by an express or implied contract. They were at perfect liberty

to sell to someone else or to keep the land, and there was no sort of obligation upon the applicant's part to sell to him, unless it should be such slight obligation as would grow from a feeling of neighborly kindness and gratitude for an accommodation, which would probably incline them to give him the preference at equal prices.

As we have said, the transaction was perfectly legitimate. And yet the slightest misunderstanding of the effect of what was said or done on the part of these applicants might throw it over the line between the lawful and unlawful.

Many of these applicants (as is admitted in the supplemental brief of defendant in error, page 38) were ignorant people, and might easily suppose that Gesner's purpose to buy the land if he could, with his expression of the price he would be willing to pay, and his encouragement of them to file upon the land, together with their expectation to sell the land to him (all of which, as we have seen, was perfectly legitimate under the decision of the Supreme Court), amounted to a contract, or at least to an "understanding" in relation to the matter. And, of course, it might be in some sense an understanding, although not of that definite character amounting to an attempt to bind the parties, and therefore *not contractual in its nature.*

And yet these ignorant, uneducated persons, after having stated the facts—stated what was said and done, which in many instances corroborated the claim of Gesner—were permitted to tell the jury *what their understanding was of the transaction.*

Take, for instance, the case of the witness Calavan. He had already testified to everything that took place between him and Gesner, and after relating all this in detail, he was asked:

"Q. *What was your understanding at the time* as to what the terms were upon which you were taking it up?"

And he answered: "Why, I understood that I was to receive $500 for the same when patent issued."

"Q. And was it *your intention* at the time you were making that filing to convey it for the $500 as soon as you did get patent, or what was your intention in respect to it?"

"A. My intention was to convey it t othem when I got patent."

"Q. To whom?"

"A. To Gesner."

All of this was in the direct-examination, and all of which was objected to upon the ground that it called for a conclusion of the witness, and was incompetent and not binding upon the defendant in any way.

Printed record, pages 351 and 359.

It must be remembered that the witness had already testified what Dr. Gesner had said to him: "That he asked Dr. Gesner what Dr. Gesner would do, and Gesner told him the claims would be worth $500, or that he would give $500 for it when patent issued, but that he (Calavan) would be *under no obligation to sell to Gesner.*"

Printed record, pages 351 and 357.

So the witness Crain was asked:

"Q. What was *your understanding as to whether you had promised to do that or not?*" (To let Dr. Gesner have the land.)

To this the defendants objected, and the Court ruled that he might *state his belief.*

To which ruling the defendant excepted, and the witness was

then asked: "What do you believe?"

To which the defendants objected as irrelevant, incompetent and not binding upon the defendants in any way.

"A. Well, *I would have felt that way* if I had went ahead and proved up on the land, and they had furnished me the money to do it with." (This witness never proved up at all.)

"Q. *Was that your understanding of it?*"

"A. Yes, sir."

All of this went in subject to the objection and exception that the same was irrelevant, incompetent and not binding upon the defendants in any way.

Printed record, pages 388 and 395.

So the witness Hudson was asked:

"Q. What was your intention as to what you would do with the land at the time you signed that?"

"A. Well, I was going to sell it, of course, if I could. I took it up for speculation."

"Q. Sell it to whom?"

"A. *Well, I was going to sell it to the highest bidder.* I was calculating to make a thousand dollars out of it if I could, and if I couldn't I would let it go to Dr. Gesner."

"Q. *What did you understand* at that particular time as to *whether you had agreed to sell* it to Gesner or not?"

"A. Well, now, *I don't know; it was kind of an agreement*—a verbal one, though."

Printed record, pages 467 and 473.

And the witness Feuerhelm was asked:

"Q. What was your understanding when you left Gesner and when you filed on the claim *as to whether you had promised* that you would let him have it when you got the title?"

"A. Well, there was no real promising."

"Q. You ddn't say that?"

"A. No, sir."

"Q. But what was *your understanding* as to what *you be-*

heard and what *he believed?*"

"A. *I believed nothing else*, but I went in to file on the claim."

All this was admitted subject to the same objection as the other testimony.

Printed record, page 515.

Can there be any doubt that this incompetent testimony would influence the jury in arriving at a conclusion as to whether or not there really was a contract between the applicant and Gesner? and yet it is perfectly clear under the authorities we have already cited that it was incompetent for that purpose. Indeed the learned counsel for the defendant does not attempt to defend it upon that ground. But there is an attempt to *excuse* its admission upon the ground that it tended to show that these applicants *had actually committed perjury.*

It is expressly conceded, however, in the brief of the government (supplemental brief, pages 33 and 34) that actual perjury upon the part of the applicant was not a substantive or necessary element of the crime charged (*conspiracy to suborn*), and that it was neither *necessary to allege or prove that fact.*

But it is claimed that while the perjury of the applicants was in no sense a *necessary* or *material* element of the offense, yet it was "proper" to prove it for some collateral purpose.

But in what way could the undisclosed understandings and

intentions of these *applicants* throw any just or proper light upon the *previous plan* of the *defendants?*

It is true that the overt acts of the persons charged with a conspiracy, in the nature of a consummation of the plan, may be offered in evidence as throwing a back light upon their previous plan. This is only a corollary to the general proposition that the subsequent act of *any defendant* may be proven where it throws a light upon the question of whether or not he committed the crime charged.

But the secret intention and understanding of these applicants were in no sense an overt act. First, because they were not conspirators in *this offense;* and second, because their "understanding and intention" was not an "overt" act, or any act at all, but only *a state of their mind and understanding.*

That these applicants were not parties to the *conspiracy charged in this indictment* goes without saying. The conspiracy charged was to suborn *these same applicants* to commit perjury, and to say that an individual can be guilty of a conspiracy to suborn *himself* is an absurdity on its face, and the Court so charged the jury clearly in this case, that "such persons are not accomplices in the conspiracy or crime for which these defendants are being tried."

Printed record, page 1459.

If any perjury was committed by them they were, of course, accomplices, at least in *that* crime. Even if they could be said to be *conspirators* with one or more of the defendants, each to commit his own individual perjury, or even if each could be said to have conspired with one or more of the defendants to defraud the government in relation to his own particular piece of

land, that would not in any sense make them conspirators in the *general* plan charged against these defendants—that is, a general plan to suborn a large number of persons, *including these applicants* to *commit perjury*. And the rule admitting overt acts has never been extended to permit the overt acts of *other* persons *not parties to the conspiracy charged* in relation to *other conspiracies* not charged.

Again, an overt act, as its name implies, is an open, manifest act and does not rest in secret intention or corrupted understanding. It is the open act, generally, of the defendants themselves, but always *an open act*, of which the defendants may be assumed to have knowledge, and it is the direct antithesis of secret intention or understanding.

Black's Law Dictionary, Title, Overt Act.

Even if it be assumed that the open acts of these claimant were admissible as against the defendants, it could be only upon the theory that these acts were known to the defendants, and therefore threw back light upon the *previous plan of the defendants themselves*. But how could the undisclosed intention and probably warped understanding of these applicants, sequestered in their own mind and undisclosed to the defendants, throw any light upon the previous plan of the defendants? Are they to be charged and condemned because, forsooth, the applicants misunderstood their words or language? Or because of a possibly evil intent in the latter's mind?

Yet it was upon such pitiable pretenses as these that this testimony, so prejudicial to the defendants, so contrary to every principle of law and every principle of natural justice, is now claimed to have been admitted.

Authorities are cited in appellants' brief to the effect that direct testimony may be offered in *a proper case* as to the intention of a party.

We do not dispute this proposition, but these are all cases where the intention was a necessary and substantive element of the offense; and, therefore, where the intention of the third party was a *necessary element* of the prosecution's case, as where the defendant offers *evidence of his own intention* (such was the case of White vs. State in the 53 Indiana), or where the defendant is charged with the aiding or abetting of the *actual commission of a crime*, and it becomes *necessary*, therefore, to prove that the crime was actually committed by the third party, and therefore that he had the necessary criminal intent. Such was the case of Brown vs. United States, 142 Federal (where the party was charged with aiding and abetting in the misapplication of bank funds by a bank), and the case of Lamb vs. State, 95 N. W. 1050 (where the crime charged was the *actual procuring* of another person to steal the cattle). If the defendants had been charged in this indictment with the crime of actually suborning perjury, then a corrupt intent on the part of the alleged perjurers would have been a material element of the offense. Since they could not have been guilty of a subornation without the actual intention of the party suborned to swear falsely, and such testimony, as

will be seen by an examination of the authorities cited, is admitted, not for the purpose *of showing any evil intent, or plan, or purpose*, upon the part of the defendants, but to show that the crime, which they must be shown by *other evidence* to have instigated, was *actually consummated* by the other party, without which such instigation would not become criminal within the charge.

Here, as we have seen, it was entirely immaterial whether the crime was consummated or not, and the *acts* of the applicant could only be admitted (if at all) for the purpose, and only in so far as they threw a back light upon the alleged previous plan of the defendants. And this, as we have seen, the "understanding and intention" of the applicants could not do.

A number of authorities are cited to the effect that the courts permit a wide range in the matter of circumstantial evidence in the cases of conspiracy.

This is, no doubt, true, and it may occur to some minds at least that that is no reason why an offense of this nature should be provable by evidence which would not be considered sufficient or competent in other classes of crime just as heinous, and that the courts have gone quite far enough in permitting defendants to be tried for this crime upon mere suspicion, and remote and fanciful inference and conjecture.

But these authorities do not hold, and we do not know that it has been ever held, that even in circumstantial cases evidence can be offered which is *totally incompetent*, or that the party can

be tried or prejudiced—not by his own words or acts, not by any doings or circumstances within his knowledge, but by an understanding or misundertsanding, the intention or lack of intention, in another whose mind he cannot read and whose heart he cannot probe.

It is doubtful if this is a case of circumstantial evidence at all, except in the sense that all cases are circumstantial—that is depending and strengthened or rebutted to some extent by the circumstances surrounding the transaction. Surely, the evidence pro and con as to what was actually done by the parties as to the making of a contrate in this case, and what was actually done and said at the time, is as direct as it is in most cases, and the only element in this case which can be fairly said in any proper sense to depend upon circumstantial evidence is as to the previous combination and agreements of the defendants; and upon these, as we have already shown, the misunderstanding or bad intention of the *applicant* at a *subsequent* time could throw no light whatever.

And we submit again that there is no looseness of the law as to circumstantial evidence—no possible stretch of the discretion of the Court—which has ever been permitted to justify the admission of *positively incompetent testimony*, having no just bearing whatever upon the *charge in the indictment*, but tending to inflame the minds of the jury by showing that a large number of perjuries were, perhaps, committed in the transaction out of which the defendants' alleged guilt is claimed to have arisen, and to confuse and mislead the jurors by introducing the inferences and understandings (or, as we believe, misunderstandings) of

the witnesses, to control the facts and actual language of the defendants.

But it is now cunningly argued that this testimony was admissible as a sort of *cross-examination* of the government's own witnesses, upon the theory that they were unwilling. But this pretext is as idle as the other. The Court, it is true, had discretion t opermit *leading questions* to an apparently unwilling witness, and in that sense to cross-examine. But we have never seen it stated, and we think it has never been held, that this rule (or, rather, exception to the rule) justifies the introduction of *positively incompetent testimony*, or that under it a party can be permitted to prove his case by the *understanding or intention of his witnesses*, rather than by the facts themselves, or that it subjects the other party to the danger of being tried and convicted upon the misunderstandings and misinterpretations of a lot of ignorant people, utterly incapable of drawing close distinctions or legal discriminations. People so ignorant that, according to their own statements, when they were told they "*couldn't make a contract to sell the land*" without any qualifications whatever, yet claim that they "understood" that that meant "a *written contract.*" Or, like the witness Calavan, who was willing to swear that he "understood" that "he was under obligations" to sell to Gesner, although he said Gesner had told him in so many words that he was "to be under no obligations whatever."

It is true, as has been said, that the Court has discretion to permit a party to ask leading questions—put the words in the witnesses' mouths, and set aside the general rule impressed upon our judicial system by hundreds of years of experience: that the best way to get at the real truth is to let the witness *tell his own story in his own words.* We hope that this exception to the rule may some time be limited more closely than it is, for it seems to us there is no discretion more dangerous, and no place in the trial of cases where the trial Court is more likely to be imposed upon to the defeat of right and justice.

But the Court *has* that discretion, and the government exercised this privilege *to the utmost,* as appears by the record herein —not only leading its witnesses, but putting the words in their mouth, until it was, in many instances, no longer the *witness* testifying, but the *counsel,* and the witness only had to "O. K." what he said.

And it is because the Court *had this* discretion that we are not complaining here about the asking of these leading questions, and putting the words in the witnesses' mouths, and this is the reason we have not presented it as error in our brief in this case: not because we were conceding it was right—not because we believed that these witnesses were unwilling witnesses for the government.

Every circumstance in the case shows that they were not, but on the contrary, that they were held in the hollow of the government's hand.

True, according to the theory of the government, they were guilty of perjury; *but the fact that they were not indicted, al-*

though according to the government's theory they were guilty, shows that there was a perfect understanding between them and the government. They were swearing for their own salvation. They knew they had not been indicted, *because they had sworn* and *were to swear for the government* in these cases. *They knew that the government could still indict them.*

They knew that to be indicted—*whether guilty or innocent*—meant to these poor people financial (if not moral) ruin; that even if acquitted, the expense of a trial meant bankruptcy. Under these circumstances, as we have said, they were at the mercy of the government, and their only hope was in telling such a story as *would satisfy it.* They knew from the fact that they were not indicted, and that they were being used as witnesses, that however much they might commit themselves by their testimony, they would *never be indicted so long as they told a story against the defendants* which was *satisfactory to the government.*

Under these circumstances the learned attorneys for the government were permitted not only to lead them, but to put the very words into their mouths, not once, but systematically and constantly. To say, "Wasn't this so?" and "Wasn't that so?" and "Didn't you understand this?" and "Didn't you intend that?"

To our minds, the only unwillingness these witnesses showed was an unwillingness to perjure themselves in this case for the government—unwillingness to swear falsely that there was a contract made, or that they did promise to sell the land to Gesner, when they knew there was no such contract and that they had made no promise to sell.

It is a pretty hard test to put to any man, to ask him to swear falsely against his neighbor, *directly* and positively, *to a fact that does not exist,* even under the fear of the government and government prosecution. But when the government is permitted to ask them about an "understanding" it makes it *easier for their conscience,* and it was not such *bald perjury* to say that they *had an understanding,* or that they "*felt under obligations,*" or that they "*intended*" to convey the land.

"Understanding" is an indefinite and uncertain thing. It may mean much or it may mean little. It may be partial, nebulous, conditional and uncertain, or it may be definite, complete and exact.

The mere expectation of *probably* selling, if you know that the other party expects to buy, might amount to an "understanding" in some sense, although there was no attempt to *obligate each other* in any way.

As we have said, the Court had no *discretion* to permit the government to make its case by incompetent testimony, or by establishing the crucial fact as to whether or not the defendants *planned to have these applicants make a contract,* by *their* intention as to what they were going to do with the land and *their* understanding as to the *effect* of *the* arrangement between them and Gesner.

It is said in the supplemental brief of the defendant in error that these witnesses were unwilling to admit they had committed perjury, and that, therefore, the government should have been permitted to cross-examine them as to that. But for what purpose? These applicants *were not on trial,* and for the purpose of *this* case it would not, as we have already seen, make the least difference in the world whether these witnesses' general intent

and understanding would make their open act in proving up *perjury* or not. The only shadow of plausibility in the claim is that it would bear upon their credibility as witnesses. And under what rule is it that the government *may impeach its own witness* by showing *particular discrediting acts of that witness?* It is contrary to every elementary principle, and needs no authority to show it cannot be done.

It is also now urged on behalf of the government that these questions can be justified as to one or two of the witnesses who were thus interrogated, and who testified that Biggs told them that an arrangement would not be a contract unless it was in writing, and thereby, as is said in the supplemental brief, "took the advantage of their ignorance." But we submit that it is perfectly clear that this is a mere pretext, and the testimony was neither offered nor admitted on that ground.

If it had been, it should have been limited to the witnesses who had so testified, but it was not, and all the witnesses, even those who had had no talk with Biggs at all, were asked the same questions.

Besides (passing the improbability of Biggs, who was a lawyer, having told these witnesses that a contract would have to be in writing in order to be a contract), it is perfectly clear that such proof would be entirely inconsistent with the charge in the indictment. A plan upon the part of Biggs and the other defendants to deceive these applicants and induce them to swear that they had made no contract, by deceiving them and inducing them to believe that they had, in fact, made no contract, would be an entirely different thing from the charge in the indictment, because in that event the plan of the defendants would not be to have them commit perjury, which would be a *wilful and inten*

tional false swearing on the part of the applicant. And while the act might still be culpable, and might make the defendants guilty of planning to defraud the government, it would not be the offense charged in this indictment, which was not a "conspiracy to defraud the government," but a deliberate plan, the very purpose and intent of which, as stated therein, was to induce these applicants to swear *wilfully* false. All this makes it very clear, then, that the prosecution, after having charged one crime, the *"conspiracy* to suborn perjury," was trying to prove it by showing that the defendants had, perhaps, committed other crimes.

If the government desired to offer evidence of this kind, it should have charged the defendants with the far less serious crime of "conspiring to defraud the government," which would have been sustained by evidence, that the defendants were trying to deceive the applicant into swearing to an honest, but really false, statement. The trouble with the trial of this case was that it was presented to the jury upon a loose theory, and anything was admitted that tended to show that, at *some* time, a subornation of perjury or conspiracy to defraud the government had been committed, *whether it tended to sustain any element of the crime actually charged or not.*

We submit, therefore, again, in conclusion upon this matter, that the admission of this testimony was clearly erroneous, and must unquestionably have lead the jury to try the case, not upon what was said and done between the parties, but upon the vague understanding and supposition and imagination of these ignorant witnesses.

ERROR IN ADMITTING EVIDENCE TENDING TO SHOW THAT THE LAND INVOLVED IN THE ALLEGED CONSPIRACY WAS DEVOID OF TIMBER, IT BEING CHARGED IN THE INDICTMENT THAT THE CONSPIRACY RELATED TO LANDS SUBJECT TO ENTRY UNDER THE TIMBER AND STONE ACT.

The argument made by defendant in error in his supplemental brief upon this point entirely ignores the fact that the indictment itself charges conspiracy to suborn perjury when the several persons to be suborned would be applying to purchase and enter lands *subject to entry under the timber and stone act.*

The defendant in error calls the attention of the Court to the charge of the judge in this particular (pages 1463-1464 of the transcript of record), wherein it is said substantially that the relevancy of such evidence (the evidence tending to show that the land was more valuable for grazing than for timber) is the relationship it may have to the motive, intent or design of the defendants in the doing of the acts charged against them in the indictment under which they are tried; and defendant in error contends that this evidence is admissible for that purpose.

In effect, the jury were told that they could consider the evidence referred to in determining the motive, intent or design of the defendants in a conspiracy to suborn perjury when the applicants would be applying to enter land *more valuable for timber* than for other purposes.

How is it possible that a person's motive for suborning perjury, when applicants would be applying to enter land more valuable for timber than for grazing purposes, is shown in any way by evidence tending to show that the very land which it is claimed as a matter of fact was being applied for was void of timber?

It is not possible, in the first place, that the design of persons in suborning perjury to enter timber lands is shown by the fact that they had at other times sought to acquire grazing land improperly; but that is not this case.

A large part of this evidence related to and covered the very land that it was charged in the indictment the applicants would be applying to enter and purchase, and we submit that the prosecution cannot claim that such evidence is admissible for *any purpose.*

According to the indictment, the conspiracy was to suborn perjury when certain persons would be applying to enter and purchase, in the manner provided by law, certain lands of the United States lying in Crook County, in the District of Oregon, *open to entry and purchase under the acts of Congress approved June* 3rd, 1878, *and August* 4th, 1892, *and known as timber and stone lands.*

This is a part of the description of the offense, and it is too obvious, it seems to us, to require argument that the prosecution must prove the offense as laid, and should not have been allowed to offer evidence tending to show that the lands to which the conspiracy related were more valuable for grazing than for timber purposes, and consequently not subject to entry and purchase under the acts referred to, under the theory that this was done in order to show the motive, intent or design of the defendants in doing the acts attempted to be charged, the acts admitted to be charged being that the defendants conspired to have persons swear falsely when such persons should be applying to enter and purchase lands *subject to entry under the acts referred to.*

The theory of the defendant in error amounts to this: that the prosecution may offer evidence tending to show that defendants did not do the things charged in the indictment, in order to show their motives, intent or design in doing the things charged.

It is manifest, if the conspiracy involved subornation of perjury when persons would be applying to enter and purchase lands not subject to entry under the timber and stone act, that this was not the conspiracy charged in the indictment, and so the prosecution was allowed to secure a conviction by offering proof tending to establish a different offense from the one charged.

If a man was charged with the larceny of an animal, the particular charge being that he stole a white steer, the property of A. B., would any one for a moment contend that the prosecution might show that, in fact, the steer alleged to be stolen was black, and that such evidence was admissible to show the motive, design, etc., of the defendant in doing the act charged against him: namely, the act of stealing a white steer?

Or if the defendants were charged with conspiracy to commit a crime, the particular charge being that they conspired to steal one white steer, the property of A. B., would any one contend that in order to show the motive, intent or design of the defendants in doing the things charged that the prosecution might show that the particular steer to which the conspiracy related, and which the defendants conspired to steal, was black, and not white as charged in the indictment?

The two cases concerning the larceny of a steer are identical with the one at bar, in so far as the admissibility of evidence is

concerned tending to show motive, intent or design, and show the utter fallacy of the argument of defendant in error, as they are stripped of all matter immaterial to the question involved.

Counsel for defendant in error, in stating what the motive of the plaintiffs in error was, does not refer to the record showing where the testimony is upon which this claim is based. He is merely stating his inference from some evidence which was introduced in the case by the government, and does not refer to the contention of the defendants at all; and while we do not concur in his view, it is immaterial for the purposes of this case what the truth is, inasmuch as under the evidence admitted and the theory upon which the case was tried, by the judge presiding, the contention might be made.

On page 62 of the supplemental brief it is said:

> "The testimony of the various applicants shows conclusively that not one of them filed upon the land because it was valuable chiefly for its timber. On the contrary, the evidence clearly shows that very little, if any, of the land was chiefly valuable for its timber."

As shown by the references in our first brief, the government was permitted over the objection of plaintiffs in error to offer evidence tending to show that all of the land to which it was claimed that the conspiracy related was more valuable for grazing than for its timber.

The contention of the defendant in error now is that plaintiffs in error were extremely desirous of acquiring grazing land, and that they therefore had a motive to acquire such land in any possible manner. All this, however, does not tend to show the motive, intent or design for a conspiracy to procure people to take a wilful false oath when such persons would be applying

to purchase and enter land subject to entry under the timber and stone act, land which was more valuable for timber than for grazing purposes. Additional force is added to the contention that we are making by the fact that the conspiracy alleged in the indictment did not contemplate subornation of perjury as to the amount of timber on the land to be applied for. It was directly charged that the land was open to entry under the timber and stone act, and that the falsity of the oath to be taken consisted in the several applicants swearing that they had not made any contracts whereby the title which they might acquire should inure to the benefit of any other person.

Not a case is cited by defendant in error that bears even remotely upon the question here presented, and we confidently insist that non can be found in support of his claim.

All this evidence was ruled out at the first two trials, and admitted at the last trial under a claim that is utterly without foundation; that it somehow bore upon the motive and intent or design of plaintiffs in error.

As suggested before by us, when reduced to the last analysis the contention of defendant in error is simply this: it is permissible for the prosecution to show that the defendant did not do the thing charged against him in the indictment for the purpose of showing his motive, intent or design in doing it.

The argument for defendant in error proceeds upon the theory, apparently, that evidence that has a tendency to convict the defendants on trial of any offense is admissible, regardless of whether or not it has a tendency to show them guilty of the particular offense charged in the indictment.

The case of Olson vs. United States, 133 Fed. Rep. 849, is cited in support of the contention that it was admissible in the

case at bar to show that the land to which the conspiracy related was more valuable for grazing than for timber.

The Olson case holds, page 849, Section 6, syllabus:

> "Where circumstantial evidence is relied on to show that entries of land under the timber and stone act were fraudulent, and made for the benefit of others than the entrymen, to whom the timber on the lands was subsequently conveyed for a consideration shown, it is competent for either party to show the value of such timber, as a circumstance bearing upon the bona fides of the transaction."

If the entrymen in the Olson case received all the timber was worth, it was a circumstance tending to show the bona fides of the transaction, otherwise it tended in the opposite direction.

Such evidence is only admissible in case the evidence relied on is circumstantial.

In no event does the Olson case even remotely bear upon the question now under discussion, namely: may the prosecution introduce evidence contradicting an allegation of the indictment in a matter descriptive of the offense sought to be charged, for the purpose of showing motive, plan or design?

In the Olson case the evidence under discussion bore upon a question in issue.

In the case at bar the evidence admitted did not have the slightest tendency to support any matter in issue, and it resulted in securing a conviction founded upon evidence tending to show plaintiffs in error guilty of an offense not charged in the indictment.

The argument of defendant in error and all the cases cited upon this point are utterly without bearing upon this case, when it is borne in mind what the allegations of the indictment are.

Our first brief cites cases in support of the proposition that an offense must be proved as laid in the indictment; and we have repeated a portion of our first argument and restated the proposition in different forms here, because of the fact that our first argument failed to call the attention of the learned attorneys for the government to the point under discussion.

See the discussion in our first brief on this subject from page 98 to 105, inclusive.

We submit that the admission of the testimony complained of is plainly reversible error.

THE COURT ERRED IN CHARGING THE JURY AS FOLLOWS:

THE OFFENSE IS SUFFICIENTLY PROVED, IF THE JURY IS SATISFIED FROM THE EVIDENCE, BEYOND A REASONABLE DOUBT, THAT TWO OR MORE OF THE PARTIES CHARGED, IN ANY MANNER OR THROUGH ANY CONTRIVANCE POSITIVELY OR TACITLY, CAME TO A MUTUAL UNDERSTANDING TO ACCOMPLISH A COMMON AND UNLAWFUL DESIGN, FOLLOWED BY SOME ACT DONE BY *ANY ONE* OF THE PARTIES FOR THE PURPOSE OF CARRYING IT INTO EFFECT.

See transcript of the record, pages 1444 and 1465.

This error is discussed in our first brief, pages 139 to 141, both inclusive, and we refer to it again, although counsel for defendant in error does not mention it in his printed brief, because at the oral argument he contended that this error was cured by the following instruction:

See page 1458, transcript:

> "If, after weighing the entire evidence, you are satisfied beyond a reasonable doubt that affirmative answers to these several questions should be had, and you further find, beyond a reasonable doubt, that some one of the overt acts charged in the indictment was done by any one or more of the defendants for the purpose of effecting the object of the conspiracy charged, then you should convict such of the defendants as you may find entered into and formed such conspiracy."

It is apparent that the instruction last referred to does not state the law corectly itself, inasmuch as it directs the jury, in substance, that as far as the overt act is concerned it is sufficient if they find, beyond a reasonable doubt, that some one of the overt acts charged in the indictment was done by ANY ONE OR MORE OF THE DEFENDANTS for the purpose of effecting the object of the conspiracy charged.

The indictment charges that each one of the overt acts was committed by plaintiff in error, Biggs, and the jury must find, in order to convict, *an overt act by Biggs*, while this portion of the instruction authorizes a conviction if some one of the overt acts charged was done by *any one or more of the defendants*. The jury might convict under this instruction if an overt act was committed by Williamson or Van Gesner, or by both of them.

No jury could possibly get a correct idea of the law from this instruction and the one complained of. The instruction complained of is absolutely erroneous. The instruction which, as it is claimed, cures the erroneous instruction is itself erroneous and confusing. It is true, of course, that the instructions are to be read together, but when read together, if they fail to state the law correctly, they are erroneous. As far as this curative instruction is concerned, it is another case of the blind leading the blind.

TESTIMONY OFFERED AGAINST GESNER AND WILLIAMSON TENDING TO SHOW THAT GESNER HAD FRAUDULENTLY ACQUIRED SCHOOL LANDS FROM THE STATE OF OREGON.

Upon this question it will be necessary to say but little beyond what was said in our original brief (page 106 to page 132), since but a feeble attempt is made in the brief of the defendant in error to sustain the ruling of the Court upon this ground.

No attempt is made to attack or distinguish the great number of cases cited in our original brief, nor is there a single case cited to show that the Courts have ever gone so far in the admission of proof as to collateral offenses, as the Court went in this case. (See supplemental brief of defendant in error, pages 89 to 92.)

It must be remembered that these alleged collateral offenses were widely dissimilar from the one charged in the indictment. Indeed, there was no similarity except in the general character of the offenses.

The offense charged was "*conspiracy to suborn perjury*" in relation to *government* land to be taken under the *timber and stone* law of the United States. The conspiracy was alleged to be between Gesner, Williamson and Biggs, and the alleged plan was to have the applicants in question go before Biggs and swear falsely in relation to these *timber lands.*

The other crimes sought to be proven were subornations of perjury against another sovereignty—the State of Oregon—in relation to another and entirely different class of lands, to-wit,

school lands, and before another and different tribunal, and the acts of alleged subornation were those of only one defendant, and only two of the defendants were *claimed* to have been concerned in the alleged collateral crimes.

We submit again that the authorities cited by us in the original brief from Courts of the highest authority—some of which Courts are actually controlling upon this Court, and the others highly persuasive from the high standing of the judges announcing the opinions—are as near conclusive as anything can be, where a principle of law is involved. And that not a single case can be found where collateral crimes, so remote from the one charged and so essentially different and independent in their elements, have been admitted in evidence in a case of this kind.

Among the cases set forth on pages 118 and 119 of the original brief to which we wish to call especial attention again are the Sharp case, 107 N. Y. 427; the Boyd case, 142 U. S. 450; People vs. Molineux, 61 N. E. 286, and the Paulson case from Wisconsin, 94 N. W. 771, which are quoted from at length in the original brief; and we also desire to call the attention of the Court to the late case of Ferris vs. People, Illinois Supreme Court, 21 N. E. 821, and the opinion of Agnew, Judge, in Shaffner vs. Commonwealth, 72 Pa. St. 65.

We call especial attention to these cases, partly on account of the learning and high standing of the tribunals announcing the opinions, and partly because the opinions themselves are so clear, able and positive, and so conclusive in their reasoning that the exception to the rule permitting proof of collateral crimes in a few peculiar cases, and where the collateral acts are closely

similar in character, is not broad enough to justify the introduction of the evidence offered in this case; and, further, because they show so clearly how great the prejudice and wrong is to the defendant when the rule is overstepped, and they so stingingly rebuke the plausible pretexts under which such evidence is so frequently sought to be introduced.

It is said that this testimony was admissible for the purpose of establishing "knowledge, intent, motive and pre-existing design, system and scheme." (Supplemental brief of defendant in error, page 89.) But it is not pointed out in what way the collateral crimes tended to prove any of these things, or why these things became so peculiarly material in this case as to justify the setting aside of the ordinary rule and the introducing of a lot of testimony which must inevitably have greatly prejudiced the defendant in other ways—other crimes which, even if committed, ought not to have been permitted to have prejudiced the defendant in this case, and of which the defendants, if innocent, had no notice and no opportunity to fairly meet and disprove.

Let us analyze! The alleged commission of these other crimes certainly did not show the *motive* for the commission of the crime in question, because the lands were not the same; and the fact that a man had committed a crime to get one piece of land does not show a motive for committing a similar crime to get another piece, any more than the stealing of $10 from one man shows the motive for stealing $20 from another man at another time.

Possibly the mere fact that these defendants, or some of them,

owned school land which was in the same general locality as that filed upon might have tended in a remote way to show motive or probable desire on the part of the defendants to acquire the lands in question, if that desire had been in any way in question. But here there was never any question about the defendants' desire to control the range in that vicinity and to obtain the land filed upon by these applicants. Both the defendants, Williamson and Gesner, testified to this, and that they were loaning the money to these different applicants largely for that purpose. Surely, testimony so prejudicial to the defendants could not be put in under the pretext of proving something that was freely admitted, and stood without question in the case.

Then, again, even if the unquestioned fact that the defendants were buying and wanting lands in the vicinity was proximate enough to justify any inference of a motive to commit the crime in question, which was evidential in its character, yet it should have stopped with the mere fact of such ownership, and there was no necessity of going into the details and attempting to show that one of the defendants had *committed a crime and suborned perjury* in acquiring title to such land. Martin vs. Com., 93 Ky. 189, 19 S. W. 580.

Again, the alleged fact that Gesner had defrauded the state, or that he had suborned perjury in that regard, could not properly be said to show any scheme, or design, or system of planning together with Biggs to get other persons, in entirely independent transactions, to perjure themselves in relation to other independent lands, belonging to the United States government and taken under the timber and stone act—an entirely independent law.

The only way that the alleged defrauding of the State of Oregon and the alleged perjury in relation to school lands belonging to that state could throw any possible light upon any alleged design, system or scheme, in this case, would be on the general proposition that a bad man was more likely to commit a crime than a good man, and that a person who would suborn perjury in one transaction might be likely to have done the same thing in relation to other transactions having some similar elements, and this is exactly what all the authorities agree cannot be done.

So, upon the question of knowledge. In what way would these alleged collateral crimes tend to show knowledge on the part of these defendants? Indeed, knowledge cannot fairly be said to be an element of this offense.

If the defendants *did* the things charged—that is, if they planned together *to make a contract with these applicants for the sale of land, and then to induce these applicants to swear they had made no such contract*—how could there be any question about their knowledge? The acts charged necessarily implied knowledge. If the defendants did them, they knew they were doing them, and the acts charged were not equivocal in themselves. It was not like the act of passing counterfeit money, where the act itself is equivocal, and its lawfulness or unlawfulness depends entirely upon the knowledge of the defendant as to the character of the money. Here there is no such question involved, because the acts charged were not equivocal in their nature. The only question was: *did the defendants do the acts charged?* If they did, they must necessarily have had knowledge of the character of their action.

The same is true in relation to the matter of intent. There was no special intent involved, and no intent was in issue, except in so far as the intent is always in issue in every criminal case—that is, did the defendant intend to commit the act which he has actually committed? In this case, as in the matter of knowledge, this intent was necessarily involved in the doing of the act charged, if done at all, *because when a man plans to make a contract with another to buy a piece of land, and then induce that other to go before an officer and make oath that he has not made any such contract*, there is no room left for any question of intent upon his part.

Therefore, these other crimes could only show the intent in so far as they tended to prove the actual commission of the offense—*the doing of the act itself*—and it only bore upon this proposition by tending to show that a man who had committed one crime—had done one criminal act—would be likely to commit other offense—do another act—of the same general character, and this, as we have seen, is exactly what the authorities say cannot be done.

The language of O'Brien, Judge, in the Molineux case, is especially instructive here:

> "But that is only another way of asserting the general proposition that the commission by the defendant of one crime tended to prove that he committed another crime; and no matter in what form or how often that proposition is asserted, or how persuasive or plausible it may appear, it is erroneous and misleading."

And again:

> "*We may attempt to deceive ourselves with words and*

phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else, in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought, so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams."

So, in the language of Mr. Justice Peckham in the Sharp case:

"It is a very general and extremely broad and, I think, a dangerous ground upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the prisoner was capable of comimtting the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. * * * *It throws light upon that intent only, as it tends to show a moral capacity to comimt a crime.* It gives, under the circumstances, *entirely too wide an opportunity for the conviction of an accused person by prejudice*, instead of by evidence showing the actual commission of the crime for which the defendant is on trial."

The peculiar and special cases in which evidence in relation to other crimes have been admitted were generally cases—

1. Where some *specific intent* other than the mere intent to do the act charged was charged and directly involved, as in the cases of *assault with intent to kill*, or to rob, or to ravish, or *an intent to defraud*, etc.

2. Cases where the criminality of the defendant depended peculiarly upon his *knowledge* as to some essential element, and where the act itself is equivocal, and collateral acts of a closely similar nature have been admitted o nthe ground of necessity, there being no other way of proving knowledge of the essential fact. Such are cases of passing counterfeit money, etc.

3. Where the collateral act in question is so intimately involved with the crime charged as to make it impossible to fully present the one without disclosing the other. Such are cases where other articles of property belonging to different owners are stolen at the same time as the article charged—cases where othr stolen articles are found in the possession of the defendant together with the article in question, etc.

4. Cases where the collateral crime may be fairly said to furnish a motive for the commission of the crime charged. As where a person is indicted for stealing a horse, and at the time the horse was taken he is claimed to have taken it to aid him in fleeing from justice on account of some other crime; or where the defendant is charged with the crime of murder, and it appears that the deceased had knowledge of some other crime, previously committed by the defendant, or was engaged in investigating such previous offense, and therefore the defendant had a direct motive for getting him out of the way.

We think that all the well considered cases, in which the general rule has been set aside and testimony of other crimes have been admitted, may be traced distinctly to one of these classes.

There may be sporadic cases which can be cited which have confused these distinctions, but, if so, we submit that they will be found to be poorly considered and not at all persuasive.

It is sometimes said that such evidence is admissible when "intent" is involved, but these cases must be construed as referring to some *special* intent, and not to the mere intent to do the criminal act charged, since a general intent is involved in and essential to every crime, and the application of the exception to such an intent would entirely destroy the rule against the admissibility of collateral crimes and make them admissible *in every criminal case*, and would be entirely in conflict with the long line of cases cited in our original brief on pages 118-119, among which are the cases of People vs. Molineux, People vs. Sharp, Commonwealth vs. Jackson, and Schaffer vs. Commonwealth, already commented on at so much length; and the controlling case of Boyd vs. United States, 142 U. S. 450—controlling because in that case *the general intent was directly involved* it being claimed by the government that the crime was committed in *attempting to rob*. Yet the government was not permitted to show other robberies committed by the same defendants only a short time before, Mr. Justice Harlan saying "*proof of them only tended to prejudice the defendants with the jury, to draw their minds away from the real issue.*"

We think that the cases cited in the learned brief of the attorneys for the defendant in error upon a similar question, and bearing somewhat upon this, are all belonging to some one of the classes that we have indicated, and are clearly distinguished from the case here.

The case of Ward vs. United States, 16 Peters 342, clearly belongs to both the first and second classes.

The case arose out of alleged fraudulent invoices and *a design to avoid the payment of duties*, and thereby defraud. A design to avoid the payment of duties was specifically alleged and was an essential element. The other fraudulent invoices admitted were closely similar. They were for the same class of goods, shipped by the same party, to the same party, and under exactly the same circumstances, and were admissible both for the purpose of showing the alleged specific fraudulent intent, and also for showing knowledge that the goods were undervalued.

Moore vs. United States, 150 U. S. 57, belonged just as clearly to the fourth exception. It was a case where the deceased was supposed to be investigating a previous crime, which, if committed by the defendant (as claimed), furnished a direct and obvious motive for the defendant to get hi mout of the way.

The Olson case in the 133 Federal, and other cases of the same kind, belonged to the first class. There the very gist of the offense was the *intent to defraud*, and the testimony in relation to the other offense exactly similar in every particular—violations of the same law, by the same parties, in relation to the same class of land.

This case, and all cases where a specific design *to defraud* is the gist of the charge, are a long journey from a case like the one at bar, where a conspiracy is charged to do an act which is unlawful in its very nature, and which, if done at all, neces-

sarily involves, from the very character of the act, the general criminal intent.

It is said in relation to this class of testimony, and also in relation to the evidence as to lands not being timber land (although it was described as timber land in the indictment), that it was admissible *in rebuttal*, because it tended to show "knowledge and intent," and because it is claimed to have falsified the claims of the defendant. But knowledge and intent (if material at all) are always an element of the prosecution's case *in direct*, and this testimony did not show any falsity in the claim of the defendants unless it may be said to show that they committed other crimes, and therefore were more likely to have committed the crimes charged, and this, as we have seen, was clearly inadmissible.

If the defendants had denied that they were interested in land in that locality, or had denied that they desired the use of this land for their sheep, or that they wanted other land in that vicinity, it would have been a different thing; but there was no such claim whatever. And, therefore, the only effect of this testimony was to lead the jury to believe (rightfully or wrongfully) that they had been engaged in other crimes of the same general character, and therefore were more likely to have committed this offense.

However, we are not depending greatly upon the matter of the proof being offered in rebuttal, since the order of proof may

be claimed to be within the discretion of the Court, and we do not have to assume the task of showing that there was an abuse of discretion.

What we do claim in that regard is that it *aggravates the error in admitting the evidence at all,* since it gave the defendant less notice and opportunity to meet and disprove the collateral charges than he would have had if presented in the government's direct case.

It must be remembered that the case was being tried hundreds of miles from the locality in question, and that such locality was a remote interior point, not reached by railroad lines of travel, and these matters of the alleged collateral offenses, of which the indictment had given the defendants no notice whatever, were held back and presented at the last minute, within a few hours of the close of the case, and when they were entirely defenseless against the deadly venom of the collateral charges.

In this regard we quote from the Circuit Court of Appeals for the Eighth Circuit, in the case of Golden Reward Mining Co. vs. Buxton Min. Co., 97 Fed. 417, which was a civil case, but the reasoning of which is applicable here:

> "And that the attention of the jur ywould have been unduly distracted had the trial Court admitted evidence which would have permitted such issues to be raised with respect to the ore mined on the defendant's claims during the period of the trespass. Besides, it would have been not only *unfair, but extremely prejudicial to the plaintiff*, if, after the defendant had opened its case and made considerable progress therein, a class of testimony had been admitted which would have compelled the plaintiff, for its own protection, to make

a careful examination of the slopes, levels and drifts within the defendant's territory, even if such an examination was then possible, for the purpose of showing in rebuttal what was the amount and value of the ore which the defendant had obtained within its own claims."

If this is true in a civil case, and as to matters which the parties had some notice by the pleading, how much more is it true in a criminal case where the liberty and reputation of presumably honest and honorable men are involved, and where the evidence is as to alleged collateral offenses, of which they had no notice, and of which they can only be supposed to have had knowledge, by assuming *in advance* that they were *guilty* rather than innocent of the collateral wrongs?

We submit, therefore, that the contention about these collateral offenses being admissible for the purpose of showing design (?) or knowledge (?) or intent (?) or scheme (?) or system (?) in a case of this kind, where these things are only involved, as they are in all criminal cases, is a mere pretext—a mere drapery of idle words, which is to be thrown over the great wrong and prejudice which was done to these defendants in order to hide its viciousness from view.

The detail and particularity with which the criminal elements of these alleged acts upon the part of the defendants was presented and dwelt upon could not have been for any other purpose than the obvious one of prejudicing the defendants by holding them up before the jury as men of criminal depravity who had been at other times engaged in criminal acts of the same general character, and therefore who were likely to have committed the crime in question, without giving the defendants any chance or notice of what was to be done, or any fair or

adequate opportunity to meet, or to excuse, or to palliate the charge of these other crimes.

Let the language of Mr. Justice Peckham, in the Sharp case, speak again as to the admission of this kind of evidence in a case like this:

> *"It is a very general and extremely broad, and, I think, a dangerous, ground upon which to claim the admissibility of evidence of this character to say that it tends to show that the prisoner was desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence.* I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a different place, and to accomplish the commission of another act. *It throws light upon that intent only, as it tends to show a moral capacity to commit a crime. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice, instead of by evidence showing the actual commission of the crime for which the defendant is on trial."*

IMPEACHMENT OF WITNESS BRANTON.

It is admitted in the brief of the learned attorneys for the government that this witness was a very important witness for the defendant.

It is true that the learned attorneys see fit to make a fling at the credibility of the witness and say that his tesimony bore the "earmarks of perjury."

But we submit that the statement is entirely gratuitous and has no bearing whatever upon the legal question involved, and is entirely without foundation in fact.

The air and manner of the witness was as frank and candid as that of any witness in the case, and there was absolutely no notive for him to commit perjury. He did not know any of the defendants at all, except the slight conversation he had with Gesner at the time of the transaction in hand. There was absolutely no question about his being with the other men at the time of their talk with Gesner. All the witnesses for the prosecution, without exception, corroborated him as to his being there. He did not *make any filing whatever*, and, therefore, was entirely free from any criminality in the matter himself. At the time of the trial he had been living on a homestead at Sisters, some twenty or thirty miles away from the lands in question, but in the same county for two or three years.

At the first trial of the case nobody seems to have known his whereabouts, although his presence at the talk with Gesner was freely mentioned by the other witnesses. During the second trial of the cause he happened to be at Prineville at the office of an attorney there and read the account of a portion of the trial in which the witnesses had narrated what they claimed to be the transaction. He mentioned the fact that he was present and gave his understanding of the story, and the result was that in the third trial he was subpœnæd.

There is nothing in the world in his story to justify the reckless charge of perjury made in the brief of the learned attorneys for the defendant in error.

In the intelligent and the frank telling of his story there is a pleasing contrast with the shuffling, evasive and contradictory stories of nearly all the witnesses for the government, and one cannot read his story and then turn to the reflections in the brief which we are answering without a feeling that the enmity displayed grows from the fact that this witness was in a position where he could not be successfully bullied by government detestives into swearing to something which was not true, as he was absolutely free from wrong in the matter, and therefore no one could hold any club over his head.

On his direct-examination he was asked to tell, and did tell, the simple story of what took place at the time of the talk with Gesner, as he understood it. He did not refer in any way to the occasion about which he was afterwards cross-examined (which was two or three days before the main transaction).

In order for the Court to see just what foundation there was

for his cross-examination and subsequent impeachment in relation to the collateral matter, we print his direct-examination in full:

"Q. Where do you reside?"

"A. At Sisters, Crook County, Oregon."

"Q. Do you remember going up into the timber with Campbell Duncan and perhaps some others in June, 1902?"

"A. Yes, sir."

"Q. On that trip you state to the jury whether or not you saw Dr. Gesner, one of the defendants."

"A. Yes, sir, I did; at a claim they call the Williamson shearing plant, on that trip."

"Q. Did you hear any talk between Dr. Gesner and the people there relative to the timber claims?"

"A. I did."

"Q. You may state who was present, as far as you now recall, when he made that talk."

"A. There was five, I think, or possibly six, men present; to be positive to the number I would not; I would not swear to that. There was Campbell Duncan and a man by the name of Ray; I don't know his name except Ray, and I think two other men. I would not be positive as to two, but one other in particular, who said his name was Beard. He was a man I would not know if I met him again; I have entirely forgot his looks, but that was the number. There might possibly have been six, but at any rate five. Do you want me to state the conversation?"

"Q. Yes; you may state the conversation as far as you remember it occurring between them referring to timber claims."

"A. Well, as regards to the exact matter that was brought up, I would not be positive to the words used, but at any rate this man who claims—the man I think they call—Dr. Gesner called him Beard, if I remember right—"

"Q. You think what?"

"A. I think the doctor called him Beard; this man asked Dr. Gesner what about these claims; will you buy them, these timber claims. Dr. Gesner stated to him that he could not buy them, he could not make a contract at all, and, further he said, 'You can't sell them,' and went ahead to give his reasons for it."

"Q. What reason did he give?"

"A. He said that he had legal advice on the matter, and that he was told that he could not make any contract at all."

"Q. Was there anything said as to what these timber claims would be worth?"

"A. Why, the doctor did say, finally, that after they got their patents, if they wanted to sell them, they would be worth at least $500 to him."

"Q. Did you hear him say anything about a mortgage?"

"A. Why, yes, sir."

"Q. What was said about the mortgage?"

"A. About the mortgage?"

"Q. Yes, if anything."

"A. Why, the doctor said he would loan them the money to prove up on the timber claims, and would take their notes, and take a mortgage to secure him."

"Q. Was anything said as to how long the mortgage was to run?"

"A. There was to be no definite period, was my understanding; that it did not make any difference to the doctor how long they ran, was my understanding of the matter."

"Q. Was anything said about the rate of interest and how the interest was to be paid?"

"A. He said he would charge no interest, provided he got the use of the grass."

"Q. Did he state for what purpose? What was his language relative to the use of the land?"

"A. Well, I don't exactly understand your question, Mr. Wilson."

"Q. Was there anything said so that you knew how the interest was to be paid?"

"A. Yes, he said that he wanted to use it for grazing purposes."

"Q. For grazing purposes?"

"A. Yes, sir."

"Q. The use to pay for the interest? For the grazing purposes?"

"A. That was my understanding of it."

"Q. Was there anything said in your hearing to the effect that the doctor was to furnish the money to prove up on, and after getting the title to pay the balance?"

"A. No, sir, I don't remember anything."

"Q. Did you hear him ask anybody if they were satisfied with such a proposition, and did they assent or dissent?"
"A. I did not."

Printed record, pages 1102-1105.

This was his entire direct-examination.

Upon cross-examination the witness testified upon this question in answer to questions propounded by the defendant, as follows:

"Q. How did you happen to be up in that country at the time these timber claims were being taken up? Where were you going then?"
"A. I was going to Eastern Oregon from Lane County. I had been in the lumber business on the Siuslaw, and got washed out and pretty badly used up, lost something like $4,000 worth of logs in the flood, and was feeling rather on the blue order, and didn't feel like logging at the present time, and I went out there with the idea of taking up a homestead, and possibly locating in the country."
"Q. I thought you were on your way to Idaho; wasn't you?"
"A. When I met Campbell Duncan?"
"Q. Yes."
"A. No, sir, I was not."
"Q. Did you say you were?"
"A. I did not."
"Q. You didn't tell him that?"
"A. I did not."
"Q. Did you tell anybody that?"
"A. I did not."
"Q. How did you come to go to Campbell Duncan's house?"
"A. *I was on my way to Vale, Oregon, in the eastern part of the state. I had a younger brother there by the name of Fred, and he wanted me to come out to where he had located, and I had started at that time, thought I would go*

up there, and I came along where Campbell Duncan was living."

Printed record, pages 1118-1119.

This was the only foundation for the impeachment.

The witness Adams was then called for the purpose of impeaching the witness Branton, and after some preliminary questions was asked the following question:

"Q. Well, did he state to you that he was going to Idaho at that time?"

The defendant's objection that this was not proper impeachment and incompetent was overruled, and the witness answered: "Yes, sir." And again:

"Q. I am talking about the time he camped there; did he state to you that he was going to Idaho?"

Same objection, and the witness answered: "Yes, sir."

Printed record, page 1248.

Then the witness Duncan was called and practically the same questions were asked of him.

Here, then, the witness was distinctly *held up before the jury as being impeached* and discredited in relation to this immaterial matter—a matter that had no bearing whatever upon the issues of the case, and about which either he or the witness for the prosecution might be readily mistaken.

The statement that he made on the witness stand, and which was sought to be impeached by this testimony, was his answer upon cross-examination, that at the time *he had started to go to Vale, in the extreme part of Eastern Oregon*, where he had a brother.

The Court will take judicial notice that the town of Vale is more than 200 miles from Prineville, in the vicinity of which place this talk occurred. It could not make the least difference in the world, with the merits of this case, whether he was on his way to *Vale in the eastern part of Oregon*, as he said on the trial, or whether he was *going across the line into Idaho*, as it is claimed he said to Duncan and Adams.

The rule is universal that it is error to permit the impeachment of a witness in relation to such collateral and immaterial matters, and yet this was deliberately done by the learned attorneys for the government, and the witness was held up before the jury as discredited by a supposed contradiction in relation to such a matter; and the ruling of the Court could not be construed in any other way than as indicating to the jury that it was proper matter for them to consider in that regard.

Of course, the review of Branton's testimony in the brief of the learned attorneys for the defendants in error is a mere matter of argument as to his credibility, etc., and cannot have any weight here. Whoever may be right as to the credit and truthfulness of this witness, nobody will dispute that we had a right to have his testimony submitted to the jury and weighed

by them, free from any discrediting methods that could not be applied to any other witness.

It is said that "no harm could have been done in permitting Campbell Duncan to testify in answer to the impeaching question," because it is said he had already testified to that fact under cross-examination *before the witness Branton had been called at all.*" It does appear that there had inadvertently crept into the case a statement of Duncan of a similar character, but we submit that this is not an excuse or justification for the deliberate impeachment of the witness Branton in that regard. The statement by Duncan in his cross-examination was not directly responsive to the question asked, nor was it a matter of any importance at that time, as Branton had not been on the witness stand, and it was not apparent that it was, or would be, in any way in conflict with his story. The statement seems to have escaped the attention of counsel on both sides at the time, and probably made no impression upon the jury. The jury had absolutely no right to consider it for the *purpose of impeachment*, since no foundation whatever had been laid for it, and the defendants were entitled to have the Court so instruct the jury.

But when an apparent foundation was laid for his impeachment by the cross-examination of Branton putting the words into his mouth, and then when Duncan was deliberately recalled on rebuttal *for the very purpose of impeaching the witness*, and the objection of the defendant was overruled, *how could the jury understand anything else but that it was a proper matter for them to consider as an impeachment* of the witness?

Then, again, it is perfectly obvious that the further impeachment of this witness by Adams, *who had never testified at all in relation to the matter*, would be in all respects damaging in its character. Every witness was a new accumulation against the defendant. As between Branton and Campbell, the jury might believe Branton, or they might not know whom to believe; but when to that was added the impeachment by Adams, they would or might probably think that the witness Branton was effectively impeached and discredited.

It is too well settled to admit of controversy that the calling of one witness on impeachment, who was incompetent, or as to whom there is on foundation laid, will not be any the less error because *some other witness has properly testified to sustain the same impeaching fact.* For who can say that the witness as to whom no proper foundation was laid was not the very one the jury believed? and the same is true in a case of this kind.

But it is said that it was material because, as is said:

> "If Branton had expected to remain there, he would be much more able to remember accurately what Gesner had said."

We submit that there is no such rule of logic, but if there was, and so remote and conjectural a bearing could make a proper founadtion for impeachment, the argument is entirely dissipated by the fact that Branton had not testified at any time that he expecte dto remain in that vicinity. On he contrary, the statement sought to be impeached was *that he was on his way to Vale*, which, as we have seen, was more than 200 miles away, and it was sought to impeach this by showing that he said at the time that, *instead of going to Vale, he was going to Idaho.*

What difference could it possibly make in his memory whether he was going to Vale on the Oregon side of the line, or to Idaho across the line, and forty or fifty miles farther on? It needs no reasoning to show the utter futility of these arguments or to make it clear that this witness was held up before the jury as being impeached, upon a collateral matter which, in so far as the issues of this case was concerned, was wholly and entirely immaterial.

But is also said that it was proper cross-examination for the purpose of testing the memory of the witness. Assume that this was true *for the purpose of cross-examination*, and it does not follow that you could *impeach the witness* in relation thereto. There are many collateral matters about which a witness may be asked in cross-examination for the purpose of testing his memory; but the rule is as old as the hills that his answers in relation to suc himmaterial and collateral matters is conclusive. Yoou cannot, then, follow it further and impeach him by attempting to show that he was mistaken, or wilfully and deliberately lied in relation to such matters.

Rapalje on Witnesses, page 348, Section 209, Subdivision 3.

Thousands of authorities might be cited to the same effect, but the principle is elementary, and we do not deem it necessary in this honorable Court.

So, it is so plain that the defendant is *prejudiced* by having his witnesses held up for impeachment upon such matters that we have not thought it necessary to cite any great number of authorities theroen.

If a learned judge, sitting on the bench, would think, even on the spur of the moment, that it was proper to be considered for such a purpose, how could it be hoped that the untrained minds of jurors would not be prejudiced thereby?

The authorities, however, cited in the main brief are conclusive that the admission of such evidence is reversible error; and, indeed, theer is no case where it was held otherwise.

Th case of People vs. McKeller, 53 Cal. 65, is directly in point on this question. Also the case of Pierce vs. Schaden, 50 Cal. 540, in which one of the honorable judges of this Court participated.

We submit, therefore, that it is perfectly clear that, upon this point alone, the defendant is entitled to a reversal in this cause.

There are several other questions which were presented in our original brief, but as the learned attorneys for the government have not attempted to make any answer to them we do not deem it necessary to add anything further thereon.

In conclusion, as in our original brief, we again invoke the judgment of this Court that the Court below erred in at least eight important particulars:

1st. In holding that the indictment was sufficient.

2nd. In holding that evidence of the alleged perjury in the

matter of final proof was admissible, and sustained the charge in the indictment.

3rd. In permitting the witnesses to state *their understanding* of the transaction with Gesner, and their undisclosed intentions as to the final disposition of their claims.

4th. In charging the jury that the indictment might be sustained by proof of an overt act by *any* of the defendants, whereas the indictment only charges overt acts of the defendant *Biggs*.

5th. In refusing to instruct the jury that there must be, in some form, a *definite agreement* or concert of action between the parties to make a conspiracy, and that a simple intent *to evade the provisions of the timber law* would not sustain the indictment.

6th. In admitting evidence of alleged distinct offenses *against the State of Oregon* in the matter of its school lands.

7th. In admitting evidence that the lands were not "most valuable for their timber," and were *not subject to entry under the timber law*, and as to alleged perjuries in that regard under an indictment which did not charge such perjuries, but did charge that the lands *were* subject to entry under that act.

8th. In permitting the witness Branton *to be impeached as to collateral and immaterial matters.*

We assume, of course, that however great the supposed interest of the government may be in this case, that we will receive at th hands of this Court every careful protection to our rights and every presumption of innocence, that the law accords to the

commonest malefactor charged with the commoner and grosser crimes—we ask for nothing more—we are surely entitled to expect that.

Respectfully submitted,

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